REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1928,
AND JANUARY TERM, 1929.

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HENRY P. STODDART,
OFFICIAL REPORTER

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1928.

RUSSELL C. WILLIS, APPELLANT, V. WINFIELD SPONSLER ET AL., APPELLEES.

FILED MAY 15, 1928. No. 25593.

1. **Bills and Notes:** RENEWALS. The making and the accepting of a promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect.
2. ———: ACCOMMODATION MAKER. "An accommodation maker of a promissory note is not liable to the party accommodated." *Empson v. Richter*, 113 Neb. 706.
3. **Escrow.** An escrow should be made by all parties to the instrument deposited.
4. **Parol Evidence:** NOTES: ACCOMMODATION MAKERS. In a payee's action on a promissory note, parol evidence, as a general rule, may be admitted to prove that defendants were accommodation makers, where that defense is an issue of fact.
5. **Homestead:** MORTGAGE: FORECLOSURE: DEFENSES. A suit to foreclose a mortgage on a homestead may be defended on the ground that the note and the mortgage purporting to secure it were signed by mortgagors as an accommodation to mortgagee and were never unconditionally delivered.
6. ———: ———: ACCOMMODATION MAKERS: DELIVERY. Evidence outlined in opinion *held* sufficient to prove that a real estate mortgage on a homestead was signed as an accommodation to mortgagee and that it was never unconditionally delivered, though recorded.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

C. P. Anderbery, for appellant.

Charles A. Chappell and *Harvey M. Wilson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

ROSE, J.

This is a suit in equity to foreclose a mortgage for $1,925.33 on a hotel and two lots of ground in Wilcox, Kearney county. The mortgage and the note that it purported to secure were dated March 16, 1922, and were payable September 15, 1922. Russell C. Willis, payee and mortgagee, is plaintiff. Winfield Sponsler and Mattie Sponsler, husband and wife, makers and mortgagors, are defendants.

In an answer to the petition defendants admitted the signing of the note and the mortgage, but alleged that the real estate in controversy was their homestead, that the mortgage was never delivered, and that it and the note were given without consideration as an accommodation to plaintiff.

Upon a trial of the issues raised by the pleadings the district court canceled the mortgage and dismissed the action. Plaintiff appealed.

It is argued by plaintiff that an unpaid debt evidenced by two prior notes aggregating with interest the amount of the note in suit was a valid consideration for the latter. The prior notes were executed by defendants in favor of plaintiff under the following circumstances: Winfield Sponsler purchased from plaintiff March 30, 1920, a half section of land in Wichita county, Kansas, for $6,720. Later, to secure part of the unpaid purchase price, defendants executed a mortgage for $3,200 on the Kansas land. In addition they gave a secured interest coupon note for $192 and also an unsecured note for $1,600 on the purchase price, both dated March 1, 1921, and payable March 1, 1922. For an amount equal to the sum of these notes and interest, or $1,925.33, defendants, March 16, 1922, signed a third note and also a mortgage on the hotel property in

Wilcox, Nebraska. This third note and the mortgage purporting to secure it, while unrecorded, were left in the First National Bank of Wilcox, Nebraska, in care of William Halstead, cashier, where they remained more than three years. Plaintiff eventually procured possession of them, had the mortgage recorded June 6, 1925, and brought this suit June 12, 1925, to foreclose the mortgage.

On the issue of consideration for the third note plaintiff testified in substance that none of the notes were paid; that the note in suit was given for the 192-dollar note and the 1,600-dollar note plus interest; that the latter note was given for Kansas land, was merged in the note for $1,925.33, and was given to take up the other notes, including principal and interest. Plaintiff still held the original notes at the time of the trial and introduced them in evidence as a part of his case in chief. The debt evidenced by one of the original notes retained by him was a lien on the Kansas land. While holding onto the prior notes and the lien on the Kansas land he brought suit in Nebraska on the new note. He did not testify that the new or third note was a renewal or that it was given to extend the time for payment of the old or original notes or that it and the mortgage on the Nebraska real estate were given as additional or collateral security. There was no evidence of an agreement that the new note discharged the original indebtedness. The following is a well established rule of law:

The making and the accepting of a new promissory note for an existing one is not a payment of the maker's original indebtedness, unless there is a specific agreement to that effect. *Spear v. Olson,* 104 Neb. 139; *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *Nebraska State Bank v. Walker,* 111 Neb. 203; *Farmers State Bank v. Dowler,* 112 Neb. 262; *Exchange Nat. Bank v. Schultz,* 113 Neb. 346; *City Nat. Bank v. Denslow,* 114 Neb. 600.

There is no direct proof that defendants as makers of

the old notes are not now liable thereon to plaintiff. The only parties to this litigation are the makers and the payee. No innocent purchaser is interested in the controversy.

With plaintiff's case as thus outlined it was defended in part under the following theory of the law:

"An accommodation maker of a promissory note is not liable to the party accommodated." *Empson v. Richter,* 113 Neb. 706; *Farmers Nat. Bank v. Ohman,* 112 Neb. 491; *Spangenberg v. Losey,* 116 Neb. 112.

In the present instance defendants testified they signed the new note and the mortgage at plaintiff's request to bolster up his credit in Kansas until September 15, 1922, the date fixed by the parties for the surrender of both instruments. Other testimony on behalf of defendants tended to prove the following facts: When the note and the mortgage in controversy were signed, defendants did not have the title to the hotel property. Papers relating to the purchase thereof by defendants had also been left at the First National Bank of Wilcox, Nebraska, in charge of William Halstead, cashier. That property had been traded to defendants for a quarter section of land in Frontier county, Nebraska, and the title to the latter tract was involved in an action pending in the supreme court on appeal. Under an agreement obligating plaintiff to surrender the new note and the mortgage as accommodation paper by September 15, 1922, defendants signed them. The appeal was not determined until May 1, 1925. *Sponsler v. Max,* 113 Neb. 477. There is evidence of the facts thus outlined.

The rejoinder of plaintiff, as presented in an able argument, was that all evidence tending to prove the defense of accommodation paper was incompetent, leaving nothing to support the judgment below; his view of the defense being based on the contention that the testimony assailed as incompetent orally contradicted the terms of a written contract creating the following escrow:

"We are this day depositing in escrow with the First National Bank, Wilcox, one mortgage and note to be turned

over to R. C. Willis when title to lots 25 and 26, block 7, is turned to Winfield Sponsler; the understanding being that, if title is not turned to Winfield Sponsler and the other papers now in escrow with said bank are turned back to the original depositors, then this mortgage and note are to be turned back to Winfield Sponsler.

"R. C. Willis, Leoti, Kansas.
"Winfield Sponsler."

There seems to be a fatal defect in this instrument as an escrow. It does not bear the name of or bind Mattie Sponsler, a party to the note and the mortgage. She pleaded and testified that the hotel property was the homestead of defendants. She testified also that she never saw or authorized the escrow. The husband testified that his wife was not present when the escrow was signed, that he never read it, that he signed his own name to it supposing it conformed to the accommodation agreement, and that he told Halstead not to deliver the note and mortgage to plaintiff. In addition, the mortgage in the hands of Halstead showed on its face that Mattie Sponsler was a party to it. An escrow should be made by all parties to the instrument deposited. 21 C. J. 870, sec. 12. Oral evidence that the note and the mortgage were accommodation instruments was properly admitted. An unconditional delivery was essential to a foreclosure. Though plaintiff denied the making of the accommodation agreement, there was a clear preponderance of the evidence in favor of defendants on the issues that they were accommodation makers and that there never was an unconditional delivery of the note and the mortgage. It follows that error does not appear in the proceedings and judgment of the district court.

AFFIRMED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLEE, V. SCHOOL DISTRICT NO. 64, DOUGLAS COUNTY, APPELLANT.

FILED MAY 15, 1928. No. 25876.

1. **Schools and School Districts:** SCHOOL DISTRICTS: POWERS. A school district is a creature of statute possessing no powers whatever beyond those given by the legislature, and is unable to contract, *ad libitum*, as individuals may do, but only respecting objects, and to the extent, the laws permit.
2. ———: ———: ACTION ON CONTRACT: PETITION. To state a cause of action against a school district founded wholly on contract, it must affirmatively appear from the pleading that the contract in suit is one which the school district is empowered to make.
3. **Pleading:** EXHIBITS. A written instrument incorporated as an exhibit and expressly made a part of a pleading, and a part of a cause of action or a defense therein stated, controls the allegations thereof which it contradicts or which are inconsistent therewith.
4. **Schools and School Districts:** CONTRACT FOR BUILDING: BOND OF CONTRACTOR. If a contract with a school district is entered into for the construction of a school building under lawful terms and conditions specified therein, and the contractor gives a bond, in substance, conditioned for the faithful performance of such contract, and as required by section 3224, Comp. St. 1922, the covenants and conditions of such bond as a secondary contract are not to be read into or construed as a part of the primary contract, or as effective to alter, narrow or limit or otherwise vary the legal obligations thereof.
5. **Parol Evidence:** WRITTEN INSTRUMENTS. The rule excluding parol evidence to vary or contradict a written instrument applies only between the parties to such instrument and those claiming under them. It has no application to controversies between a party to the instrument on the one hand and a stranger to it on the other.
6. **Subrogation:** RIGHTS OF SUBROGEE. Subrogation is the substitution of another person in place of a creditor so that the person in whose favor it is exercised succeeds to the rights of a creditor in relation to the defendant. But such subrogee can acquire no greater rights than the creditor had to whose rights he succeeds at the time of such payment made by him.

7. **Contracts**: WRITTEN MATTER CONTROLS PRINTED MATTER. When an instrument consists partly of written (or typewritten) and partly of printed form, the former controls the latter where the two are inconsistent.
8. ———: STATUTES. Statutes, with reference to which contracts are made and entered into, become a part of such contracts.
9. **Bonds**: UNAUTHORIZED CONDITIONS. Where the conditions of a statutory bond are separable and part are authorized by statute and part are not authorized or even prohibited, and the statute does not expressly, or by necessary implication, declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage, and the residue sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common-law bonds partly good and partly bad.
10. **Contracts**: REPUGNANT CLAUSES. Where two clauses of a written instrument are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn, or where the conflicting clause is on the back of the contract.
11. **Schools and School Districts**: INDEMNITY BONDS. So far as the members of the board of a school district act, under section 3224, Comp. St. 1922, in exacting a bond for the benefit of laborers, mechanics and materialmen, they exercise statutory powers exclusively conferred upon them as trustees for the beneficiaries to be protected thereby, and do not act for, or in behalf of, the school district of which they are officers in accepting, taking and keeping this statutory bond.
12. ———: ———: ACTION AGAINST SCHOOL DISTRICT. The obligee of the bond, in view of the subject of the action in suit, appearing therein solely as a trustee and not as representative of the school district, defendant, and the terms of the bond sued upon imposing liability, if at all, on the obligee only, such bond affords no basis for a cause of action against the school district in its corporate capacity.

APPEAL from the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed and dismissed.*

DeLamatre & DeLamatre and *J. C. Travis*, for appellant.

Montgomery, Hall, Young & Johnsen, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

EBERLY, J.

Action in the district court for Douglas county, Nebraska, by the American Surety Company of New York (hereinafter referred to as surety company) against School District No. 64, Douglas county (hereinafter designated school district) on an alleged covenant in writing contained in a builder's bond executed by the surety company only, which, by delivery to, alleged acceptance of, and retention by, the school district, became the obligation of the latter. This alleged covenant provides in express terms that "the obligee (school board of School District No. 64, Douglas county, Nebraska) shall retain * * * not less, however, in any event, than ten *per centum* of (the value of all work performed or materials furnished in the prosecution of such contract)." There was judgment for the surety company for the amount of its claim, and from this judgment the school district appeals.

The plaintiff, as part of its petition in the trial court, set forth copies of certain specifications in writing for the construction of the proposed school building; the written proposal or bid of one Gustafson based thereon, wherein it was stated that the "amount of the bid on the specified work" is an amount named and certain (without any further or other specifications as to times and conditions of payment); the acceptance of such bid in writing on May 31, 1924, by "school board of School district No. 64, Douglas county, Nebraska," and also a copy of the builder's bond (identified as exhibit D and expressly made a part of plaintiff's petition) executed in behalf of Gustafson by the surety company only. In this bond the "school board of School District No. 64, Douglas county, Nebraska," is the sole obligee named. The penalty of the bond is $10,300. It is dated June 2, 1924. It identifies the primary contract to which it is collateral and sets forth the terms and conditions thereof in the following language:

"Whereas, the principal has entered into a written contract dated *May 31st, 1924,* with the obligee, for *erection of new school building according to the plans and specifications attached,* a copy of which is hereto annexed: *Now, therefore, the condition of this obligation is such that, if the principal shall indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract, and if the principal shall pay off and settle in full with the person or persons entitled thereto all accounts and claims that may become due by reason of laborers' or mechanics' wages, or for materials furnished or services rendered to the principal in executing or performing the obligations of said contract, so that each of such persons may receive his just dues in that behalf, then this obligation shall be void; otherwise to remain in full force and effect.*

"Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right to recovery hereon:

"First: That in the event of any default on the part of the principal, a written statement of the particular facts showing such default and the date thereof shall be delivered to the surety, by registered mail, at its office in the city of *Omaha, Nebraska,* promptly and in any event within ten (10) days after the obligee or his representative, or the architect, if any, shall learn of such default; that the surety shall have the right within thirty (30) days after the receipt of such statement to proceed, or procure others to proceed, with the performance of such contract; shall also be subrogated to all of the rights of the principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon any claim which the obligee may then or thereafter have against the surety, and the surplus, if any, applied as the surety may direct.

"Second: That no claim, suit or action by reason of any default shall be brought against the principal or surety

after the *twenty-fifth* day of *February, 1925,* nor shall recovery be had for damages accruing after that date; that service of writ or process commencing any such suit or action shall be made on or before such date; that the principal shall be made a party to any such suit or action, and be served with process commencing the same if the principal can with reasonable diligence be found; that no judgment shall be rendered against the surety in excess of the penalty of this instrument.

"Third: That the surety shall not be liable for any damages resulting from strikes or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes; nor for damages from injury to person, or for the death of any one; nor under or by virtue of any statutory provision for damages or compensation for injury to or for the death of any employee; nor for the nonperformance of any guaranties of the efficiency or wearing qualities of any work done or materials furnished or the maintenance thereof or repairs thereto; nor for the furnishing of any bond or obligation other than this instrument; nor for damages caused by delay in finishing such contract in excess of ten *per centum* of the penalty of this instrument.

"Fourth: That the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed; and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten *per centum* of such value), until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed; that the plans and specifications mentioned in said contract are not in any respect defective, and are and at all times will be kept adequate for the complete performance of such contract, and that no change shall be made in such plans and

specifications which shall increase the amount to be paid the principal more than ten *per centum* of the penalty of this instrument, without the written consent of the surety.

"Fifth: That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; and that the obligation of the surety is, and shall be construed strictly as, one of suretyship only, shall be executed by the principal before delivery, and shall not, nor shall any interest therein or right of action thereon, be assigned without the prior consent, in writing, of the surety." (Italics designate typewritten as distinguished from printed form.)

The plaintiff also alleged in substance, as the sole default of Gustafson, his failure to pay certain laborers and mechanics for labor that was performed, certain materialmen for materials actually used in erecting the school building covered by said contract, and his builder's bond, which claims for such labor and materials this plaintiff paid, and that such default constitutes the sole and ultimate basis for its claim under the terms of the alleged covenant specifically set forth in its petition.

The answer of the defendant embraced in substance (1) a general denial; (2) that the defendant and said Gustafson on or about May 31, 1924, in addition to the writing set forth in plaintiff's petition, entered into a further oral agreement whereby it was orally agreed that the "amount of the bid," as accepted by the school district, was to be paid in certain definite instalments by the school district to Gustafson at certain definite times, and that the "full balance" due on this contract was to be paid to said Gustafson when the schoolhouse to be constructed was completed by him and had been inspected and accepted by the school district; that the plaintiff was duly informed and advised of all the terms of this oral agreement prior to the execution and delivery of the bond (exhibit D), and that in due course of time the building was completed and inspected and accepted by the defendant, and the amount of the accepted bid paid and received by Gustafson, all in strict

compliance with the terms thus orally agreed upon. To the allegations of this answer the plaintiff filed a general denial by way of reply.

The record discloses that, on the trial, all evidence as to the oral agreement pleaded by defendant relating to the times of payment and amount of instalments constituting the "amount of the bid" was, on objection of the plaintiff, excluded. It was thought by the trial court to involve a violation of the parol evidence rule. But it also appears without substantial contradiction that the first paragraph of the conditions of the bond (exhibit D) was written in that instrument by the surety company at the request of the obligees for the purpose of making the bond in this matter comply with section 3224, Comp. St. 1922; also that the entire contract price for the school building constructed was, in good faith and in strict compliance with the terms of its primary contract, paid out by the school district to persons entitled thereto. The surety company had actual knowledge of the terms of payment contained in the primary contract, and such payments were completed before these claims of laborers and mechanics and materialmen, set forth in plaintiff's petition, were paid off and taken over by the surety company.

The record also discloses that the sufficiency of pleadings of the plaintiff was challenged by proper objections seasonably lodged to the introduction of evidence and by appropriate motions at the conclusion of the evidence.

The real questions presented by this controversy, in the form in which they come before us and in the light of the record as an entirety, when reduced to constituent elements, may be said to be narrow, technical, though simple. The authenticity of all the written instruments pertaining to the transaction, as set forth in the pleadings of the parties, are, in effect, admitted. The terms of the alleged oral contract appear in the form of offer of proof. On this basis the controversy is to be determined by a proper application of the rules of evidence and a proper construction of the provisions of the several instruments in writing which ap-

pear in the record as exhibits to the several pleadings in the light of the law relating to the subject of the action.

As preliminary to the consideration of the questions suggested, we may say that, as a rule of pleading, this court for almost half a century has been committed to the doctrine that—"School districts—mere creatures of statute—possessing no powers whatever beyond those given by the legislature, they are unable to contract, *ad libitum*, as individuals may do, but only respecting objects, and to the extent, the laws permit." *School District No. 16 v. School District No. 9*, 12 Neb. 241. Therefore, a more definite statement is required than as against natural persons. Enough should be stated to show that the alleged indebtedness was one which the school district could incur. Thus: "To state a cause of action against a school district for money 'paid, laid out and expended,' for its use, and at its request, facts must be averred which show that the supposed indebtedness was such as the district could lawfully incur." *School District No. 16 v. School District No. 9, supra.* These principles remain unmodified so far as actions founded wholly on contract against school districts are concerned.

Nebraska Telephone Co. v. City of Red Cloud, 94 Neb. 6, reaffirms the above. It announces a modification, it is true, which was approved by a divided court, and extends only to actions "for the recovery of the reasonable market value of property received and retained."

The question as to the power of the school district to make the obligation sued upon is properly presented by general demurrer or objections to the introduction of evidence. *School District No. 16 v. School District No. 9, supra; Nebraska Telephone Co. v. City of Red Cloud, supra.*

It may also be said that exhibits attached to plaintiff's petition and "expressly made a part thereof" are subject to consideration by the court without reference to the legal effect thereof as alleged by the pleadings.

Therefore, it follows in the instant case that the allega-

tions of the pleader are controlled by the statement of the written instrument on which the pleading is founded. *Carson v. City of Hastings,* 81 Neb. 681; *Carey v. Zabel,* 112 Neb. 16.

It would seem that the following statutory provisions are applicable to the subject of the action here presented: "Every duly organized school district shall be a body corporate and possess all the usual powers of a corporation for public purposes by the name and style of 'School District Number ..... of ..... county,' and in that name may sue and be sued, purchase, hold and sell such personal and real estate as the law allows." Comp. St. 1922, sec. 6239.

"It shall be the duty of the * * * contracting board of officers of all * * * school districts * * * now or hereafter empowered by law to enter into a contract for the erecting * * * of any public building * * * or other public structure or improvement; and any officer or officers so empowered by law to enter into such contract, to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work, to take from the person, persons, firm or corporation to whom the contract is awarded a bond in a sum not less than the contract price with at least two good and sufficient sureties, or in lieu thereof by one surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract. Such bond shall be to the board awarding the contract, and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. Such bond shall be safely kept by the board making the contract, and may be sued on by any person entitled to the benefit of this chapter. The action shall be in the name of the

party claiming the benefit of this chapter." Comp. St. 1922, sec. 3224.

The nature of the transaction here presented obviously requires the application of the following rule of construction: "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described." *Nash v. Towne*, 5 Wall. (U. S.) 689. See, also, *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693.

Logically, in the application of the principle of construction just announced, the first question suggested is: What effect did the secondary contract (exhibit D) have on the primary contract between the school district and Gustafson? Did its execution and delivery, as a secondary obligation, subscribed by the surety company only, and its acceptance and retention by the school district or by the school district board operate, by necessary implication, to incorporate in the primary contract between the school district and Gustafson of prior date the covenants and obligations of exhibit D as the controlling provisions thereof?

In principle, a similar question was determined in *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354. The primary contract in this case cited was an unconditional builder's contract for the erection and completion of a building for a price definite and to be paid as therein set forth. It also contained a stipulation that the contractor awarding the contract should, with some responsible bonding company, execute a bond to the employer "conditioned for the faithful performance of his duties in the erection of the building." This stipulation was complied with by the contractor as principal, together with the American

Surety Company of New York as surety, each signing and executing a bond which, after its third condition, provided "that the principal (the contractor) shall not, nor shall the surety be liable for any damage resulting from an act of God." This bond was accepted and retained by the obligee. In an action founded on this quoted provision brought by the contractor against his employer who was the obligee of the bond, it was contended that this condition must be read into and considered as a part of the primary contract for the construction of the building; that it was, in fact, a binding covenant imposed upon the obligee who had accepted and retained the bond in which it appeared and of which it formed a part; and that, therefore, the obligee was bound as for a covenant that he had duly entered into. The trial court, however, denied recovery. The supreme court of Maryland sustained this determination. In its opinion, after setting forth the terms of the primary contract for the construction of the building as entered into between the employer and contractor, that court proceeds:

"These are the main and substantial provisions of the contract. It is an absolute and unconditional contract on the part of the plaintiff. There are no conditions or contingencies incorporated or provided for therein by which he might be excused from performance, or might be relieved from loss or damage, or whereby the loss occasioned by the storm mentioned in the declaration might be imposed upon the defendant. The bond was given, not to vary or change in any particular the obligations of the plaintiff under the contract, but to secure the faithful performance by him of all the duties assumed by him thereunder. Its object was to protect the defendant from loss or damage which might result from nonperformance by the plaintiff, and cannot be construed to add to or change any of the terms of the contract, or to be taken as a part thereof. When the purpose of the contract, its subject-matter, and the surrounding circumstances at the time are considered, it would seem to be perfectly clear that the

bond is an entirely independent and collateral contract given to protect the defendant against any default or miscarriage of the plaintiff under the contract. The original obligation to construct the building had been undertaken by the plaintiff, and the bond must be treated as a contract of guaranty or suretyship for the faithful discharge of his duties under his agreement with the defendant. That the original and distinct obligation of the plaintiff existed, and that the bond was a mere collateral agreement founded upon it, appears clear from the language employed and from a consideration of the surrounding circumstances. The bond may, therefore, be dismissed from the case and should not have been introduced into the declaration."

It follows that, as applied to the present case, the foregoing decision is authority for the conclusion that the terms of exhibit D, the secondary agreement by the surety company, cannot be read into the primary contract of the school district with the contractor or, in any manner or to any degree, affect the same. The full obligations of the latter, imposed by its terms on the respective parties thereto, remain and continue in full force and effect.

We are thus restricted to the terms of the secondary contract (exhibit D) as the exclusive basis of plaintiff's recovery in this case. Under the rule of construction as heretofore announced, we will look to the language employed in that instrument, the subject-matter to which it relates (especially so far as involved in this action) and the surrounding circumstances. In other words, this court will endeavor to place itself in the same situation as the parties who made this contract, so as to view the circumstances as they viewed them, and so judge the meaning of the words and the correct application of the language employed. For this purpose the terms of the primary contract between the school district and Gustafson, including both the written part thereof, as the same appears in the exhibits heretofore referred to, and the oral part thereof as shown by offers of proof which were excluded by the

trial court on the theory that the transaction then presented properly necessitated the application of the parol evidence rule, are important, and they constitute a part, at least, of "surrounding circumstances." These excluded offers of proof disclose an attempt to establish the terms of an executed and consummated contract after full performance in strict accord with all of its terms both parol and written, but also fairly disclose that, at the time of originally entering into the same, the parties thereto, contemporaneous with the making and subscribing thereof and in addition to the written terms, orally agreed on certain parol stipulations, additional to, but wholly consistent with, the written language employed, and which served only to supply obvious omission in the written language of their agreement. *Spiegal & Son v. Alpirn,* 107 Neb. 233; *Weddle v. Specht,* 97 Neb. 693; *Huffman v. Ellis,* 52 Neb. 688.

If we assume (but do not decide) that the circumstances detailed in these offers of proof properly invoke the consideration by the district court of the so-called parol evidence rule, still we cannot approve the action of that court in excluding the evidence offered. The objecting party was not a party to this primary contract. His action was not based upon it. The primary contract sought to be proved was but collaterally involved in the pending litigation then being tried.

This court is thoroughly committed to the doctrine that the rule excluding parol evidence to vary a written instrument has no application in a controversy between a party to such instrument on the one hand and a stranger to it on the other. 22 C. J. 1292; *Stanton Nat. Bank v. Swallow,* 113 Neb. 336; *De Laval Separator Co. v. Jelinek,* 77 Neb. 192; *Fairbanks, Morse & Co. v. Burgert,* 81 Neb. 465; *Fletcher v. Brewer,* 88 Neb. 196; *Rankin v. Northern Assurance Co.,* 98 Neb. 172; *Hauth v. Sambo,* 100 Neb. 160; *Durland Trust Co. v. Payne,* 106 Neb. 135; 10 R. C. L. 1019, sec. 212; *Bjornson v. Rostad,* 30 S. Dak. 40; *Vogt v. Schienebeck,* 122 Wis. 491.

It follows that in sustaining the objection to this evidence

the district court committed reversible error.

In view of the conclusion that the plaintiff is limited, as the basis of its recovery, to the builder's bond (exhibit D) we find it unnecessary to discuss at length the proposition of the surety company that, upon payments of the materialman for materials used in the construction of the building, it acquired an equitable right of subrogation against the school district even in the absence of statutory subrogation.

Subrogation is the substitution of another person in the place of a creditor so that the person in whose favor it is exercised succeeds to the rights of a creditor in relation to the defendant, but such subrogee can acquire no greater right than the creditor had to whose right he succeeds at the time of such payment by him.

The undisputed facts are that, prior to the payment by the surety company of any claim for materials furnished in this case by the materialmen in strict compliance with the actual terms of the primary contract, the contractor had been paid in full by the school district. The materialmen involved sustained no contractual relations with the school district whatever. It is not even claimed that the school district failed to perform any statutory duties it owed them. The contractor's right to compensation having wholly ceased and determined, he possessed no rights which, under any circumstances, might inure to the benefit of his creditors. Where the creditors themselves have no rights, there is nothing to which the subrogee can be subrogated; hence, the plaintiff herein can, under the facts in this case, acquire nothing through the application of that equitable principle.

The original builder's bond was executed by the surety company and accepted by the school district with the avowed intent and purpose and effort on part of both that the same should be in full accord and complete compliance with section 3224, Comp. St. 1922. In its preparation we note that a blank form was used, evidently not intended for the purpose for which it was employed, and the first paragraph of the conditions is in typewriting, complete within

itself, and substantially complies with the provisions of the statute referred to, and the language in which it is framed carried a sense of exclusion or completeness. The remaining terms and conditions, as shown by the copy appearing in this opinion, are wholly contained in fine print of the form employed. The subject-matter to which this construction is to be applied in the controversy before us is solely and exclusively wages of laborers and mechanics and for materials furnished by materialmen in the construction of the building.

The conclusion is inevitable that the instrument before us is a statutory bond and must be construed as such with reference to subject-matter completely embraced in the statute providing for its existence.

The character of the instrument, and the subject-matter to which it applies, renders the following principles important in its construction: "When an instrument consists partly of written and partly of printed form, the former controls the latter, where the two are inconsistent." Comp. St. 1922, sec. 8850; *Union P. R. Co. v. Graddy*, 25 Neb. 849; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471. Statutes, with reference to which contracts are made and entered into, become part of the contract. *Watkins & Co. v. Kobiela*, 84 Neb. 422; *Sessions v. Irwin*, 8 Neb. 5.

"Where a bond contains the conditions prescribed by statute and also contains conditions in excess of those so required, if the excess can be separated from the authorized portion without destroying the latter, it may be rejected as surplusage, and the rest of the bond held valid, in the absence of a statutory provision expressly or by implication making it void, unless the language of the bond precludes a construction giving it validity." 9 C. J. 25, sec. 40.

Also: "The prevailing doctrine is that where the conditions of a statutory bond are separable and part are authorized by statute and part not authorized or even prohibited, and the statute does not expressly, or by necessary implication, declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage, and

the residue sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common-law bonds partly good and partly bad." 4 R. C. L. 54, sec. 14.

"It has been frequently held that, in the absence of a prescribed statutory form, and of a declaration that bonds not in accordance therewith shall be void, if a bond be taken under a statute, with a condition in part prescribed by statute, and in part not so prescribed, yet, if it be clearly divisible, a recovery may be had upon it for a breach of the part prescribed by statute. The super-added part may be rejected as surplusage." *Board of Education v. Grant*, 107 *Mich.* 151. See, also, *Van Deusen v. Hayward*, 17 Wend. (N. Y.) 67; *Walker v. Chapman*, 22 Ala. 116; *Shunk v. Miller*, 5 Pa. St. 250; *Grant & Finney v. Brotherton's Adm'r*, 7 Mo. 458; *Morse v. Hodsdon*, 5 Mass. *314; *State v. McGuire*, 46 W. Va. 328; *Welch v. Sykes*, 3 Gil. (Ill.) 197, 44 Am. Dec. 689; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758.

The language employed in expressing the first condition of this bond (exhibit D) is wholly typewritten. So far as the subject-matter of our investigation is concerned it clearly appears therein that this instrument is conditioned for the payment of all laborers and mechanics for labor that shall be performed, and for the payment of all materials used in erecting said schoolhouse or in performing the contract for the same. That no other terms or conditions are within the contemplation of the parties plainly appears from the closing words of this typewritten statement, viz.: That upon the full performance of such condition, "then this obligation shall be void; otherwise to remain in full force and effect." This "obligation" in this connection is properly definable as "the binding power of this contract." *Edwards v. Kearzey*, 96 U. S. 595.

Read the bond as an entirety and contrast the typewritten portion with the portion of the same appearing in the fine print of the blank employed and you have an instrument without material consistency or coherence of parts. The typewritten portion cannot stand if the fine print be

given effect. The two parts are, therefore, inconsistent. Under the provisions of the sections of the statutes referred to, the typewritten condition, exclusive in its expression, controls, and by construction eliminates the "fine print" portion as part of the contract. This construction, however, is not only the result of the application of a technical rule, but is the only one consistent with the surrounding circumstances and the situation of the parties at the time of the execution and delivery of the bond. The school district was, by the terms of the primary contract, then obligated to pay its contractor the entire balance due when the school building was completed, inspected and accepted. This contract was valid, complete and enforceable. For the school district to attempt to retain any portion of the sum thus contracted to be paid would be, in effect, a plain violation of its contract and subject it to damages.

The surety company knew the provisions of this contract and the situation that existed, and with this knowledge undertook to supply a bond for the purpose of complying with section 3224, Comp. St. 1922, and which would apply to that situation. For the purpose stated, it executed the bond in suit. In its typewritten provisions, this bond is entirely consistent with the primary obligation of the school district and correctly conforms to the situation of the parties to the primary contract, but its "fine print" form is wholly inconsistent with the typewritten portion thereof, and is a violation of its undertaking to furnish a bond applying to the true situation, and it fails in compliance with the statute referred to.

Can it be possible that, for a compensation in dollars, the surety company, plaintiff herein, has, knowingly, placed the school district in such a position that a good faith performance of its primary contract necessarily entails a breach of the terms of its secondary obligation with resulting damages, and that a good faith performance of the secondary obligation necessarily entails a breach of the primary contract? Such a supposition is unthinkable and wholly inconsistant with good faith and fair dealing. The acts of

all the parties to a transaction are entitled to a construction consistent with fair purpose and honest dealing.

But another incongruity appears. Plaintiff's sole contractual basis for its cause of action, a search discloses, is to be found safely tucked away as an inseparably connected part of the fourth paragraph of the "fine print" form employed. It assumes that the term "obligee," used in connection therewith, designated the school district, and therefore the school district is bound as for a "covenant" entered into. We concede only for the purpose of this discussion that the term "obligee," as thus used, identifies the corporate entity here sued. The ordinary rules of construction would necessitate construing the paragraph in which the words affording plaintiff the basis of its claim are found as an entirety. Individual sentences, individual clauses, and particular words, must be construed in connection with context.

As applied to the subject-matter, the surrounding circumstances which constitute the facts in the present case, this consideration of this "fine print" paragraph brings us to the following results: "Provided, however, and upon the express conditions, the performance of each of which shall be a condition precedent to any right to recovery hereon: * * * Fourth: That the obligee (school board of school district) shall faithfully perform all the terms, covenants and conditions of such contract (the primary contract between the school district and contractor Gustafson) on the part of the obligee to be performed (which necessarily includes payment by the obligee of the contract price as therein provided); and shall also retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten *per centum* of such value), until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed."

If the obligation on part of the obligee, imposed by the

words of the contract as above set forth, to retain "ten *per centum* of the value," is to be deemed a covenant, then the obligation imposed by the same paragraph upon the same obligee to faithfully perform all the terms and covenants of such primary contract must also be deemed a covenant. The latter is first in point of time. Applied to the facts in the instant case, the first covenant necessarily and imperatively directs the payment of the balance due, as provided by the terms of the primary obligation, which, in this case, is upon the completion of the building and its acceptance by the school district board. The second covenant, in effect, requires the breaching of covenant No. 1 to pay, and expressly requires that a portion of the purchase price, equivalent to the ten *per centum* of the value of all work done and the materials furnished, be not paid as such primary contract requires. Obviously, the "obligee" cannot be legally bound by the same contract and by the same clause of the contract at the same time to pay and not to pay. These clauses are therefore inescapably inconsistent and mutually repugnant. They cannot stand together. Covenant No. 1 is strictly in accord with the primary contract. Covenant No. 2 is repugnant to its terms.

The rule applicable is: "Where two clauses are so repugnant that they cannot stand together, the first will be retained and the second rejected, unless the inconsistency is so great as to avoid the instrument for uncertainty, and this rule is the more readily applied where the instrument is apparently carelessly drawn, or where the conflicting clause is on the back of the contract." 13 C. J. 536, sec. 493.

Whether we reject the second covenant or deem the instrument avoided for uncertainty, the same result ensues. The plaintiff's action is without support in either event.

And the same construction obtains for another reason. The obligation is a statutory bond entered into, as such, by the surety company, and is entitled to no other construction than that the parties gave it when it was entered into.

The terms and conditions, as expressed in the typewritten portion, are not only separable from the terms embodied in the fine print of the form employed in drafting the same, but are, in themselves, a substantial and complete compliance with the terms and requirements of section 3224, Comp. St. 1922. The "fine print of the form," embracing the portion of the bond on which plaintiff must rely to sustain his action, is not only wholly unauthorized by our statute, but in many respects repugnant thereto. In view of the rule announced by the authorities heretofore cited, the provisions embraced in the "fine print" of the form must, being in excess of the controlling statute and wholly unauthorized thereby, therefore, be deemed to be surplusage and to be rejected as such.

It, therefore, follows that in legal effect the entire contract of the parties in the present case is evidenced by that portion of the bond which excludes the "fine print" provisions which appear as part of the form, but which constitute no part of the legal obligation which the bond evidences.

Still, another reason exists for denying recovery on the basis of the allegations contained in plaintiff's petition filed herein. It must be conceded that, in the absence of statute, no legal duty was imposed on public or municipal corporations or officers representing the same to exact bonds such as the one here in suit. It also follows that, in the absence of statute, there was no corresponding liability for simple failure so to do. It may be said, however, that the question of the exaction of such bonds, as a matter of public policy, received judicial consideration long prior to the adoption of the statute now in force on that subject, as will be seen from the following decisions: *Sample & Son v. Hale*, 34 Neb. 220; *Lyman v. City of Lincoln*, 38 Neb. 794; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649; *Fitzgerald v. McClay*, 47 Neb. 816; *Kaufmann v. Cooper*, 46 Neb. 644; *King & Co. v. Murphy*, 49 Neb. 670; *Rohman v. Gaiser*, 53 Neb. 474.

As a summary of the doctrine of the cases just cited that

obtained prior to the passage of section 3224, Comp. St. 1922, it may be said (1) that the requirement of a bond proceeds on the basis that a "moral" as distinguished from a "legal" obligation existed, and therefore the exaction of a bond for the benefit of the laborers and materialmen could be sustained as not in excess of the power of the officers representing the corporation involved in the matter of constructing a public building; (2) apart from statutory authority, it was within the province of the proper officers of a public or municipal corporation, upon whom it devolved to enter into construction contracts, to exact as a condition precedent thereto the giving of a bond by the contractor employed, conditioned for the payment of all laborers and mechanics for labor that should be performed thereon, and for the payment of all building materials which were actually used in performance of the contract so entered into; (3) that the sureties on such bond were liable in a direct action by the parties for whose benefit it was given; (4) that, notwithstanding the form of the obligation taken, in view of the obligation it contained, it was a contract dual in its nature; that it was two contracts, separate and distinct though embodied in one writing; (5) that the case stood exactly as if the contractor and his bondsmen had entered into one direct obligation with laborers, mechanics and materialmen, and one with the district; (6) that the officers of corporate entities, so far as securing the bond for the payment of laborers and materialmen, acted not in their own behalf, but in the capacity of trustees for the beneficiaries protected by the bond. The fundamental basis on which these decisions rest is the nonexistence of statutory powers to contract with reference to the subject-matter in behalf of, or as binding upon, the public corporate entity involved.

Thus, where the stipulation in the construction contract was that the contractor should receive but 45 per cent. of the estimated cost of the work actually performed by him, and that such work should be performed by a day certain, and the payment of 90 per cent. had been paid, and the time

of the completion of the work had been extended, all without consent of the sureties on the bond, such facts, it was held, constitute no defense to actions prosecuted by laborers and materialmen upon the bond because the stipulation relied on as a defense formed no part of the obligation sued upon. This situation has been followed by the legislative adoption of section 3224, Comp. St. 1922.

"When the legislature declares * * * the public policy of the state to be that that which had theretofore been subject to contract between the parties shall hereafter be by certain prescribed forms and with specific conditions concerning the respective rights and duties of the parties thereto, the statutory provisions step in and control and regulate the mutual rights and obligations rather than the provisions of any contract the parties may attempt to make varying therefrom." *Williams v. Travelers Ins. Co.*, 168 Wis. 456.

The terms of section 3224, Comp. St. 1922, impose the duty of taking a bond upon "the contracting board of officers of all school districts." The terms provide that the instrument itself "shall be to the board awarding the contract," and "shall be safely kept by the board, * * * and may be sued on by any person entitled to its benefit." This statute vests no added power in the corporate entity, the school district as such, and imposes no additional duties upon it, and in no manner adds to its liability; in fact, the school district as such is a stranger to its terms and is not in any manner within the purview of its provisions.

This court is further committed to the doctrine that, so far as the members of the board of a school district act, under this statute, in exacting a bond for the benefit of laborers, mechanics and materialmen, they exercise statutory powers exclusively vested upon them as trustees for beneficiaries to be protected thereby. *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202. The school board does not act for, or in behalf of, the school district of which they are officers, in accepting, taking and keeping this statutory bond.

From the allegations of the petition here, it appears that the plaintiff, as foundation of alleged contractual rights, pleads the bond expressly given to comply with section 3224, Comp. St. 1922, with the obligee thereof designated as "School board of School District No. 64, Douglas county, Nebraska," and it presents a literal compliance with the terms of the statute. But the term "School board of School District No. 64, Douglas county, Nebraska," as therein used, designates, not officials acting in behalf of their school district, but trustees acting in behalf of the laborers, mechanics and materialmen who are to be the beneficiaries of the bond taken.

Therefore, if it be conceded that the words we find in the fine print of the bond, "The obligee * * * shall also retain * * * not less, however, in any event, than ten *per centum* of such value (of all work performed or materials furnished in the prosecution of such contract)," until the complete performance of all terms and covenants in the principal part to be performed, is properly a part of the bond and is to be construed as a covenant, even so, it cannot be said that it constitutes the covenant of the school district which is not named in the bond, and is not a party thereto or interested therein, which, so far as plaintiff's cause of action is concerned, has therefore no contractual liabilities. In short, the terms of the bond do not, in view of the basis of plaintiff's claim being laborers', mechanics' and materialmen's demands and the terms of the statute, impose any duty or liability upon the school district as such. If the obligee in the bond named be deemed the promisor, the obligee is not sued in the action we are now considering. What the obligee's rights and liabilities may be, they are therefore not before us for determination.

While the conclusions heretofore announced on some of the questions considered would necessitate a reversal for retrial, we are confident, in view of the entire record, however, that there is no cause of action stated, or can be stated, upon the bond in suit against the corporate entity, School District No. 64, Douglas county.

It follows, therefore, that the evidence wholly fails to support the judgment of the district court. The judgment is reversed and the proceedings dismissed.

REVERSED AND DISMISSED.

FARMERS STATE BANK OF PAWNEE CITY, APPELLANT, V. FRANK BAKER ET AL., APPELLEES.

FILED MAY 15, 1928. No. 25875.

1. **Bills and Notes: JOINT MAKERS: UNAUTHORIZED DELIVERY.** Where one joint maker of a promissory note signs the same on condition that one or more others sign, delivery thereof without such signatures to the payee, with notice of the condition, is invalid.
2. ———: ———: **RELEASE.** An unconditional release of one of several joint makers of a promissory note, without the consent of the others, is a release of all those not consenting.

APPEAL from the district court for Custer county: BRUNO O. HOSTETTLER, JUDGE. *Affirmed.*

N. T. Gadd and *Barton & Barton*, for appellant.

H. M. Sullivan and *Squires & Johnson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

REDICK, District Judge.

This action is brought by the plaintiff to recover on three promissory notes dated November 5, 1923, two for the sum of $5,000 each, and one for $3,000, signed by Frank Baker, G. A. Holeman, and B. J. Tierney. Prior to the commencement of the action Tierney died and only Baker and Holeman were made defendants. After the evidence had been taken before a jury, the jury were discharged by consent and the cause submitted to the court, resulting in a judgment for the plaintiff against the defendant Holeman, and against the plaintiff and in favor of the defendant Baker,

as to whom the action was dismissed. Motion for new trial having been overruled, plaintiff brings the cause here for review.

There is no substantial dispute as to the facts, which may be summarized as follows: Prior to 1921 the Farmers State Bank of Ansley had loaned to one Welch the sum of $12,000, and the state bank examiner had objected to this loan and ordered that it be charged off and other securities substituted for it. Thereupon, B. J. Tierney, Frank Baker, Grover A. Holeman, and A. C. Van Horn, who constituted the board of directors of the bank, borrowed the money from one Studley, giving their individual notes therefor, and took up the Welch indebtedness. When the Studley notes came due in July, 1921, the four parties named borrowed the sum of $15,000 from the Farmers State Bank of Pawnee City, plaintiff, giving their joint notes therefor. These notes were twice renewed for the sum of $13,000, $2,000 having been paid in March, 1922.

During the period of these transactions A. C. Van Horn was cashier of the Ansley bank and the holder of $8,200 of its stock, and his father, H. C. Van Horn, was president of the plaintiff bank. Some time prior to November, 1922, the Ansley bank was in a failing condition, and it was arranged between H. C. Van Horn, president of the Pawnee City bank, and Holeman, vice-president of the Ansley bank, that Holeman should purchase the stock of A. C. Van Horn at par, and the latter should sever his connection with the bank, returning to that of his father at Pawnee City; and it was a part of this arrangement that the liability of A. C. Van Horn upon the notes to the Pawnee bank, A. C. Van Horn being no longer a stockholder in the Ansley bank, should cease. This arrangement was carried out, Holeman giving his note to H. C. Van Horn for $8,200. Thereafter, upon the recommendation of H. C. Van Horn, Fred Allen, who had been an employee of the Pawnee bank, was employed by the Ansley bank as cashier, Holeman transferring to him ten shares of the stock purchased from A. C. Van Horn.

When the three notes held by the Pawnee bank came due, they were forwarded to the Ansley bank for collection or renewal, and Allen presented three renewal notes to defendant Baker for signature November 20, 1922. Baker signed them with the understanding and condition that Allen was to procure the signatures of the other makers, which he agreed to do. This transaction took place at Baker's farm about eight miles out of Ansley. The renewed notes were not presented and there is no doubt that Baker understood that the three other parties were to sign the renewals. These notes were again renewed in April, 1923, and finally November 5, 1923, under substantially the same circumstances and conditions. The last three renewals, however, were signed only by Baker, Holeman, and Tierney, the name of A. C. Van Horn being omitted in accordance with the agreement between H. C. Van Horn and Holeman above mentioned. Baker, though president of the Ansley bank, took no active part in its management, had no knowledge of the agreement just mentioned, and did not know that A. C. Van Horn had not signed the renewal notes last mentioned, but had been released from liability on said debt, until some time after the renewals of November 5, 1923, had been executed. The renewed notes were kept in a pouch in the Ansley bank, but it does not appear that Baker ever saw them.

Defendant Baker presents two defenses: (1) That he signed the notes in question upon condition that the other three parties should sign the same with him, and that the delivery of the notes without the signature of A. C. Van Horn was unauthorized; (2) that the release by plaintiff bank, acting through its president, of A. C. Van Horn, one of the joint debtors, released the defendant.

We think both of these defenses are valid and that they are fully established by the evidence. It is contended by the plaintiff that Allen was the agent of defendant Baker for the purpose of securing the signatures of the other makers on the note, but we are of the opinion that Allen was the agent of the Ansley bank and the Pawnee bank for the

purpose of obtaining the renewals in question, and that notice to him of the condition upon which Baker signed was notice to the plaintiff. The case of *Brumback v. German Nat. Bank*, 46 Neb. 540, cited by plaintiff, is not in point, as we hold in this case that plaintiff must be charged with notice of the condition.

In *Huber Mfg. Co., v. Silvers*, 85 Neb. 760, it was held: "The unconditional release of one of several makers of a joint and several promissory note, without the consent of the other makers thereof, operates as a release of all."

We conclude that the judgment of the district court as to appellee Frank Baker is correct, and the same is

AFFIRMED.

WILLIAM SLEZAK V. STATE OF NEBRASKA.

FILED MAY 15, 1928. No. 26292.

1. **Evidence** examined, and *held* sufficient to support the verdict.
2. **Rape**: SENTENCE REDUCED. Sentence for assault with intent to rape reduced from seven to three years.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed; sentence reduced.*

Waring & Waring, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

REDICK, District Judge.

Plaintiff in error, defendant below, was convicted of an assault with intent to commit a rape upon a child of nine years of age, and sentenced to the reformatory for male persons at Lincoln for a period of seven years. Defendant brings the record here for review.

The errors necessary to be considered and relied upon by

defendant for reversal are: (1) That the evidence is insufficient to support the verdict; (2) that the court erred in refusing to allow defendant to show by nonexperts the facts and circumstances which led them to think that the state's principal witness was intoxicated; (3) that the sentence of the court is excessive.

We have examined the record with care, and while the evidence is of such a character that a verdict of not guilty by the jury might not have been reasonably subject to severe legal criticism, we are of the opinion that the evidence presented a case for the determination of the jury, is sufficient to support the verdict, and that defendant was afforded a fair and impartial trial. We do not, therefore, feel justified in disturbing the verdict on this ground.

The defendant offered to show that the mother of the complaining witness, at the time of the occurrence of the facts to which she testified, was intoxicated. This evidence was first ruled out by the trial judge, but afterwards, upon the statement in open court that such ruling was erroneous, the court permitted defendant's witnesses to testify that in their opinion the witness was drunk. In some instances, after the witnesses had stated that in their opinion the mother of complaining witness was drunk, the court refused to permit the witnesses to state the facts upon which their conclusion was based; in other instances such facts were permitted to be given. Under these circumstances we are unable to perceive any prejudicial error to the defendant. He had the benefit of the principal fact, if the jury believed that it had any bearing upon the credibility of the witness.

We have considered numerous other assignments of error regarding the admission and rejection of evidence by the trial court, but discover no prejudicial error therein.

We have concluded, however, that the sentence imposed upon defendant is excessive. The defendant is a young man just beyond the age of eighteen at the time of the offense, and so far as the record shows was industrious and of good character, the present being the only charge of a criminal nature ever brought against him. And while that

charge is one of the most heinous known to the statute and moral law and admits of no excuse, still the youth of the defendant and the extent of injury to the prosecuting witness are matters to be taken into consideration in determining the penalty. We are not disposed to minimize in the slightest degree the possible moral effect upon a female child of such an experience as that to which she was subjected by defendant's criminal act. She was, of course, greatly frightened and shocked, but received no physical injury of any kind. We conclude that a sentence of three years will meet the requirements of justice.

The judgment of the district court is modified, and sentence reduced to three years at hard labor, and affirmed as modified.

AFFIRMED; SENTENCE REDUCED.

FIRST NATIONAL BANK IN ALEXANDRIA, SOUTH DAKOTA, APPELLEE, V. L. H. ERNST, DEFENDANT: RUA F. ERNST, APPELLANT.

FILED MAY 18, 1928. No. 25969.

1. **Husband and Wife:** NOTE: LIABILITY OF WIFE AS SURETY. A note executed by a married woman, living with her husband in Nebraska, as surety only for his debt, is not binding upon her, unless it shall be made to appear that she intended to bind her separate estate for its payment.
2. ———: ———: ———: BURDEN OF PROOF. In an action against a married woman on a note, as above described, which did not relate to her separate estate, trade, or business, the burden is upon the party seeking to hold her liable to prove that she signed the note with intent to bind her separate estate for its payment.
3. ———: ———: ———: INTENT. Intent of a married woman to bind her separate estate for the payment of a note executed in Nebraska, as surety for her husband with whom she is living in Nebraska, where such note does not relate to her separate estate, trade, or business, is a condition precedent, in the absence of which she has no capacity to make a binding contract.

4. ———: ———: ———: PAROL EVIDENCE. A married woman, who, jointly with her husband, signs a note as surety only, which is dated and made payable in another state in which the common-law disability of married women to contract has been removed, and which note was delivered to the payee in Nebraska without a clause therein showing that she intended to bind her separate estate, will be permitted to show by oral testimony that, at the time of its execution, it was agreed between her and the payee that her separate estate would not be liable for the payment of such note, and it is error for the trial court to exclude such evidence. *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, distinguished.

5. ———: ———: ———: EVIDENCE OF INTENT. Where intent of a married woman is a direct issue, it is competent for her to testify that she had no intent to bind her separate estate, such intent being in the nature of an existing fact which she knows more about than any one else, the weight of such testimony being a matter for the jury to consider.

6. ———: ———: ———: RENEWAL NOTES. A renewal note, executed by a married woman as surety only for her husband, where no other or new consideration is shown, is subject to the same defense as the prior note.

7. Contracts: WHERE MADE BY POST. When a person in one state sends a contract by mail to a person in another, to be executed and returned to the sender, the sender makes the post office establishment of the United States his agent, and a deposit of the signed contract, by the receiver, in the post office, in an envelope properly stamped and addressed to the sender, completes the contract.

8. Bills and Notes: INNOCENT PURCHASER. One who purchases or has assigned to him, after maturity, a note signed by a married woman as surety only for the payment of her husband's debt is not an innocent purchaser and cannot enforce the note against the married woman if the payee of the note could not do so.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

F. C. Radke and *Magdalene Craft Radke*, for appellant.

Danforth & Seacat, Clare B. Davey and *S. P. Davidson, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

HOWELL, J.

Rua F. Ernst, a married woman, lived in Nebraska when the note in suit, for $1,320, was executed, and appeals from a judgment thereon. The note was dated "Alexandria, South Dakota, September 12th, 1923," "Payable at the First National Bank, Alexandria, South Dakota," to "The First National Bank *of* Alexandria, South Dakota." The note was indorsed: "Pay to the order of the First National Bank *in* Alexandria, S. D. Without recourse. Paul C. Keyes, Receiver of the First National Bank *of* Alexandria, S. D." The plaintiff bank will be referred to as the "in" bank, and the First National Bank *of* Alexandria as the "of" bank.

The "of" bank having become insolvent, its receiver sold the note to the "in" bank on January 30, 1925, after its maturity.

Mrs. Ernst pleaded coverture as one defense, claiming the note was a Nebraska contract; on and since September 12, 1922, at which time she gave a note of which the one in suit was a renewal, she has been living with her husband, a resident citizen, in Nebraska; the September 12, 1923, renewal note was obtained by Frank D. Peckham, president of the "of" bank, from her in Nebraska where it was actually executed in his presence, under an express agreement that the rights of the parties to the note "should be governed by the laws of Nebraska;" that no judgment would be asked against her thereon; that her separate estate would never be charged with payment, and that the note was so accepted by Peckham for the "of" bank. Her husband gave the first note for his individual debt of long standing, and, after he signed it, Peckham induced her to sign it, through trickery, deceit and fraud, and promised her the "of" bank would hold and not dispose of it; that no judgment would be taken against her; her property would not be charged with its payment; he desired her sig-

nature as a matter of form to get the bank examiner's approval; her signature was not asked as a maker, and the "of" bank would look to her husband only for payment. Then follows the usual allegations of reliance; of no consideration; the notes did not concern her property or business, were not given with reference to, upon the faith or credit of, or with intent to bind her estate; her husband received the sole consideration, and the "in" bank took the note in suit, after due.

Plaintiff alleged in reply: Rua F. Ernst was married; the note was "made, executed and delivered to the plaintiff by defendants *at Alexandria,* South Dakota;" the note was a "South Dakota contract," and it "was to be governed" by "certain sections of the Code of that state."

Neither note contained a clause concerning Mrs. Ernst's liability as a married woman, intent to bind, or that it was in reference to, her estate or business.

Section 1510, Comp. St. 1922, moderates the incompetency of a married woman to contract only to the extent that she "may bargain, sell and convey her real and personal property, and *enter* into any *contract* with *reference* to the same in the same manner, to the same extent * * * as a married man may." Section 1511, Comp. St. 1922, relates to her separate trade or business. There is no pretense that either note originated with her trade or business.

In *Farm Mortgage & Loan Co. v. Beale,* 113 Neb. 293, it is said: "The statute has removed the common-law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made on the faith or credit thereof, and with the intent on her part to thereby bind her separate property. *Hale v. Christy,* 8 Neb. 264; *Godfrey v. Megahan,* 38 Neb. 748; *Grand Island Banking Co. v. Wright,* 53 Neb. 574; *Smith v. Bond,* 56 Neb. 529; *Farmers Bank v. Boyd,* 67 Neb. 497; *Northwall Co. v. Osgood,* 80 Neb. 764; *Marsh v. Marsh,* 92 Neb. 189." Such intent is not presumed. It must be proved by the promisee.

The evidence is conclusive that Mr. and Mrs. Ernst

signed and delivered both notes in Nebraska, the first one to Mr. Peckham in person, and the one in suit to the post office establishment of the United States. Mrs. Ernst knew nothing about the laws of South Dakota and, of course, had no intention concerning them. She testified, over objection, she intended that the Nebraska laws should govern. Where intent is a direct issue in a case, it is competent for the doer to state his own mind, as he knows more about it than any one else. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 632; *McCormick Harvesting Machine Co. v. Hiatt*, 4 Neb. (Unof.) 587; *Beach v. Beach*, 160 Ia. 346; *Preger v. Barnett*, 175 Mich. 494; *Edwards v. Svea Fire & Life Ins. Co.*, 141 Minn. 285; *Chambers v. Chambers*, 227 Mo. 262, 282; *Eckerd v. Weve*, 85 Kan. 752, 758.

The main question in this case is: Where was the note in suit executed and delivered, and with what intent?

While the writer entertains doubt as to some of the statements in the opinion in *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, the conclusion there reached was a proper one under the facts. Mrs. Beale signed the note in Nebraska. It was dated and made payable in Kansas City, Missouri. The facts and circumstances indicate, very strongly, that the note was delivered in Missouri, and it became a contract where it became effective by delivery.

In *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, the rule is stated that, where parties to a contract "are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into."

Upon the trial of the instant case, counsel for Mrs. Ernst offered to prove that, at the time the first note (which was renewed by the note in suit) was executed, one of the executive officers of the "of" bank was present at her home in Nebraska, transacting the business for the bank; that, before she would sign the note, it was agreed that she should not be bound for the payment thereof; the note would be governed by the Nebraska laws, and, by signing the note, she would not bind her separate estate

for its payment. The trial court erroneously rejected the offer.

It has been so many times held in this state that "intent" is the foundation of a married woman's liability, as surety only, and such intent may be shown by parol, it is not necessary to cite authorities on that question.

International Harvester Co. v. McAdam, 142 Wis. 114; *McElroy v. Metropolitan Life Ins. Co.,* 84 Neb. 866; *Union Nat. Bank v. Chapman,* 169 N. Y. 538, 57 L. R. A. 513; *Dulin v. McCaw,* 39 W. Va. 721; *Scudder v. Union Nat. Bank,* 91 U. S. 406; 5 R. C. L. 935, sec. 26; *Frasier v. Charleston & W. C. R. Co.,* 73 S. Car. 140; *Garrigue v. Kellar,* 164 Ind. 676; *Glenny Glass Co. v. Taylor,* 99 Ky. 24; *Burr v. Beckler,* 264 Ill. 230, L. R. A. 1916A, 1049; *Baxter Nat. Bank v. Talbot,* 154 Mass. 213, 13 L. R. A. 52, 55, all more or less directly hold that the place where a contract is consummated, *i. e.,* the place where the last act is done which is necessary to put the contract into effect, governs as to the capacity of the parties to contract, and that such rule of law applies to married women.

It is the law that, when a person in one state sends a contract by mail to a person in another state to be executed and returned to the sender, the sender makes the post office establishment of the United States his agent, and a deposit of the signed contract, by the receiver, in the post office, in an envelope properly stamped and addressed to the sender, completes the contract without further ado. *Burton v. United States,* 202 U. S. 344; *Patrick v. Bowman,* 149 U. S. 411, 424; 13 C. J. 300, secs. 115-121.

This court has many times held that married women's disabilities to contract are not entirely abrogated; that they can contract only in reference to their separate estate, trade, or business, or upon the faith and credit of their separate estate with intent to bind the same; that there is no presumption of such interest merely because they sign contracts; when coverture is pleaded as a defense, the burden is upon the plaintiff to establish such intent, and that "all other engagements and obligations are void." *Grand Is-*

land Banking Co. v. Wright, 53 Neb. 574; *Stenger Benevolent Ass'n v. Stenger*, 54 Neb. 427; *First Nat. Bank v. Grosshans*, 54 Neb. 773; *State Nat. Bank v. Smith*, 55 Neb. 54; *Westervelt v. Baker*, 56 Neb. 63; *Smith v. Bond*, 56 Neb. 529; *Farmers Bank v. Boyd*, 67 Neb. 497; *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, and many other cases.

While the *Beale* case, last cited, may seem to run counter to some of the principles hereinbefore stated, it can be said that is more apparent than real. We have examined the facts and briefs in that case with some care, and it is easily distinguished. There was nothing in that case to show where the note was delivered after Mrs. Beale signed it in Nebraska. The note was given to a Kansas City corporation, transacting and having its place of business in that city, to close a contract with Mrs. Beale's husband for Texas land which he purchased from the corporation. The note was dated and made payable in Kansas City, at the office of the corporation. There was no proof that any agent or officer of the corporation was present and accepted the note in Nebraska when Mrs. Beale signed it, nor that it was sent to her by mail and by her returned through that agency. It is reasonable to suppose, and is highly probable, that the note was delivered in Kansas City when the contract for the Texas land was finally executed.

The case before us is altogether different. Although the note signed by Mrs. Ernst was dated and payable in South Dakota, it was delivered in Nebraska, with the knowledge of the "of" bank that she was a married woman and a mere surety for her husband's debt. The note was a renewal of a prior note. She testified when she signed the first note and gave it to an officer of the "of" bank, they were both in Nebraska, and she knew nothing about the laws of South Dakota and did not intend to bind her estate. The officer testified he had difficulty in getting her to sign it at all. When she signed the renewal note, there was no new consideration or different intent than when she

signed the first note, so far as shown by the record. No part of the business transacted by her with the bank, concerning either note, took place elsewhere than in Nebraska. Plaintiff alleged, without attempting to prove, she expressly agreed she intended to bind her estate. The officer of the "of" bank frankly testified that, when he procured the first note, he agreed the "of" bank would not sell or dispose of the note. Mrs. Ernst offered to prove it was agreed she was not to bind her estate and her signing the note would be a mere formality and she would never be asked to pay it. This offer was erroneously rejected. As against all of that, the note was dated and payable in South Dakota—nothing else.

All of this falls far short of showing any intent on the part of Mrs. Ernst to bind her estate. Had the court received her testimony as to the conversation between her and the officers of the "of" bank when he procured the first note, it would have clearly and positively appeared that there was an express intent not to do so. As Mrs. Ernst had a complete defense to the first note (if what she testified to is true, and certainly if she had been permitted to testify according to the offer and that was true), she had a defense to the renewal note unless some new and additional consideration passed, when it was executed, or unless she gave the new note with an express agreement that it should constitute payment of the other. *Auld v. Walker,* 107 Neb. 676; *Berwyn State Bank v. Swanson,* 111 Neb. 141; *May v. First Nat. Bank,* 74 Neb. 251.

Much has been said in the briefs about the effect of a purchaser of accommodation paper. We do not think that question is necessarily in this case. We think the evidence in the case, as it now stands in this court, is sufficient to have justified the trial court in directing a verdict in favor of Mrs. Ernst, without being supplemented by the offered testimony; but, as we have no means of questioning what new evidence may be available on another trial, the judgment of the lower court is reversed and the cause remanded

to the district court for further proceedings in conformity with this opinion.

REVERSED.

GOOD, J., dissents from rule stated in the third paragraph of syllabus.

STATE OF NEBRASKA ET AL., APPELLEES, V. DWIGHT PAINTER, DEFENDANT: LOUIS HALBERT ET AL., APPELLANTS.

FILED MAY 18, 1928. No. 25981.

1. **Constitutional Law**: ACT RELATING TO RECOGNIZANCES. Chapter 110, Laws 1923, being "an act relating to recovery on forfeited recognizances, and to repeal sections 10040, 10041, 10042, and 10043, Comp. St. 1922," is void for indefiniteness and uncertainty, as well as in violation of section 14, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed."

2. ———: ———. It appearing that section 2, ch. 110, Laws 1923, repealing sections 10040-10043, inclusive, was an inducement to the passage of said act, said act is void in its entirety.

3. **Bail**: FORFEITURE. Under section 10039, Comp. St. 1922, the district court may default and forfeit a recognizance given by a person in a criminal prosecution before an examining magistrate for appearance and answer to the district court, when such accused person fails to perform the condition of such recognizance, and without first giving personal notice to the accused or his sureties.

4. ———: FORFEITURE: RECOVERY. When a recognizance is defaulted and forfeited under section 10039, Comp. St. 1922, the court, to which the accused is required to appear and answer, cannot summarily render judgment thereon against the accused or his surety. The recovery of the penalty of such recognizance must be by civil action, governed by the provisions of the Code of Civil Procedure, and subject to the provisions of chapter 22, Comp. St. 1922.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

Dort, Cain & Dort, for appellants.

R. C. James, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

HOWELL, J.

Appeal by Louis Halbert and F. Kirk, as sureties, from an order forfeiting a recognizance given in a criminal case.

On July 24, 1926, Dwight Painter was charged with crime in the county court. He and sureties entered into a recognizance for Painter's appearance in the district court on that day at 11 o'clock a. m., and from term to term until discharged. November 12, 1926, the district court, in the absence of Painter and sureties, without notice or knowledge, entered an order forfeiting the recognizance and gave judgment against them for $1,000, and the clerk of the court was ordered to issue warrant for Painter's arrest.

January 27, 1927, the sureties filed a petition to set aside the judgment and forfeiture. During the October, 1926, term of the district court, trial of the case was postponed, and the jury temporarily excused. Painter's attorney, it is claimed, through "inadvertence and misunderstanding," told Painter the case would not be tried until the November, 1926, term of court. The jury were "called back" about November 12, 1926. At that time, defendant not appearing, the recognizance was forfeited. Painter's attorney explained the circumstances relating to his "inadvertence and misunderstanding," and requested, without avail, that the case be continued to November 27. Upon learning of the forfeiture, petitioners paid a $200 reward, and other expenses, for Painter's apprehension, and surrendered him to the district court, where he was tried and

acquitted. The prayer of the petition was to vacate the forfeiture "and for such other, further or different relief as may be just and equitable, and such orders as to costs be entered as may be lawful and just."

Having carefully examined the record, the petition of the sureties to set aside the forfeiture, and the judgment rendered thereon, together with the law, we are clearly of the opinion that the forfeiture of the bond was in all things regular, and that there is nothing of which the sureties can legally complain, up to that point.

The troublesome question is whether or not chapter 110, Laws 1923, is a valid and constitutional enactment. The title reads: "An act relating to recovery on forfeited recognizances, and to repeal sections 10040, 10041, 10042, and 10043, Comp. St. 1922." That act consisted of two sections. Section 1, in so far as it is material here, reads: "Whenever *such* recognizance shall have been forfeited *as aforesaid*, it shall be the duty of the clerk of the district court, upon the request of the county attorney or of attorneys for boards of education, to issue a writ of execution against the property of the surety, and the sheriff to whom such writ of execution shall be directed and delivered, shall proceed immediately to levy upon the goods and chattels of the surety," etc. (Italics ours.) Section 2 reads: "That sections 10040, 10041, 10042, and 10043, Compiled Statutes of Nebraska, are hereby repealed."

It will be noticed that this is an independent enactment and purports on its face to be complete in itself. It does not appear to be an amendment to any other act or section of the law. It does not purport to amend either of the sections repealed. The words "such recognizance" and "as aforesaid" are without meaning, unless it is somehow made to appear that the section is intended to become a part of chapter 22, Comp. St. 1922, to follow section 10039 thereof. Section 14, art. III of the Constitution, contains this provision: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title.

And no law shall be amended unless the new act contain the section or sections as amended, and the section or sections so amended shall be repealed." Said chapter 110 does not "clearly express in the title" that its purpose is to amend any section or sections of the statute.

If it be said that the words "such recognizance" and "as aforesaid" refer to section 10039, Comp. St. 1922, and we examine that section, we find no provision therein for a judgment on the forfeiture. In that situation, the new act provides that the clerk of the court shall issue a writ of execution "upon the request of the county attorney." We know of no provision authorizing the issuance of an execution upon anything but a judgment, other than this act. Whatever might be said about the provision being, in effect, amendatory of the laws relating to executions generally, it adds complications to the new act.

That chapter 110 does not cover the whole subject or general scheme to which it relates is apparent. Its purpose not to amend any particular section is likewise apparent. Its terms are not comprehensive. Statutes, so indefinite and uncertain that the courts are unable to determine what the legislature intended, are void.

Section 10039 is not the only one concerning the forfeiture of a recognizance. Section 9946, Comp. St. 1922, provides for a recognizance to keep the peace, while section 10039 refers to "in any criminal prosecution, either to appear and answer, or testify in any court." Whether the words "such" or "as aforesaid" refer to one or the other is not definitely known.

An illustration of indefiniteness is found in 25 R. C. L. 811, sec. 63: "A statute prohibiting the sale in a specified county of intoxicating liquors within a specified distance of a church, designated by name, where there are two churches of that name in the county."

The only ground for assuming that those words refer to section 10039 is the fact that chapter 110 repeals the four sections following. It is true that a recognizance differs from an appearance bond, in that the one is a debt

of record, and the other is a contract with the state. We do not think that a default and forfeiture of a recognizance is, in a true sense of the word, a judgment upon which the clerk may issue an execution, either with or without request. The trial court seemed to be of the opinion that a formal judgment on the forfeiture should be entered. Such a proceeding certainly is desirable. As to a recognizance, we think it is not necessary that any formal notice be given to the principal or sureties as a condition precedent to either a forfeiture or a judgment upon a forfeiture under any state or federal constitutional provision. The purpose of the Constitution, as to amendments, is to prevent unnecessary confusion, and fixed policies existing by statute are not to be lightly or inferentially interfered with.

Sections 10040—10043 provided a very reasonable procedure in connection with the practice of courts in exercising the equitable power of remitting a recognizance penalty, in whole or in part. Chapter 110 is extremely harsh and arbitrary. It is not sufficiently definite and certain to be effective in and of itself, because of its own terms. If it were so, it would need no interpretation by resorting to other laws, not referred to, further than to determine whether it was *in pari materia* with other laws. The Constitution would not affect it if it only changed or modified existing statutes merely as an incidental result.

We conclude that the statute is too indefinite and uncertain, and offends against the Constitution. If we are correct in this conclusion, the whole enactment is void, since it is apparent that sections 10040—10043, inclusive, above referred to, in all probability, would never have been repealed but for section 1 of said chapter. Chapter 110 being void, the trial court proceeded erroneously, as section 10040 contemplates the prosecution of a "civil action for the penalty" fixed in the recognizance.

The forfeiture of the recognizance entered by the district court will stand. The judgment entered thereon is reversed, and this cause is remanded without prejudice to

proper proceedings under chapter 22, Comp. St. 1922, as the same existed prior to the enactment of chapter 110, Laws 1923.

REVERSED.

BEVERLY LAND COMPANY, APPELLEE, V. CITY OF SOUTH SIOUX CITY ET AL., APPELLANTS.

FILED MAY 18, 1928. No. 25980.

1. **Municipal Corporations: ORDINANCES: ADOPTION: RECORD: CORRECTION.** Where the permanent record of a city council does not show that the mayor signed an ordinance or that the "yea" and "nay" vote of the members of the council was taken and recorded at the time of its enactment, a *nunc pro tunc* order, by resolution, adopted eighteen months afterward, and when a new set of city officers had been elected and installed in office, cannot be permitted to change the record of such a jurisdictional act under the guise of a correction of the record.
2. ———: PAVING ASSESSMENTS: NOTICE. Where the published notice of a proposed meeting of a city council, called for the purpose of determining special benefits to property by reason of paving improvements and for levying assessments therefor, refers specifically to the particular ordinance which authorized the improvement, the assessments so levied cannot be sustained upon the authority of an ordinance other than that specified in the notice.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

Stout, Rose, Wells & Martin, Sidney T. Frum and *George W. Leamer*, for appellants.

W. V. Steuteville, contra.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and HOWELL, JJ., and BROADY, District Judge.

BROADY, District Judge.

This is a suit in equity to cancel and enjoin the collection of certain special paving assessments made against the

plaintiff's property in the City of South Sioux City. The questions presented are (1) the validity of the ordinance creating the paving district; (2) the authority of the village board or council to correct the minutes of a previous meeting to show that the "yea" and "nay" votes of the members of the council were taken and recorded and also that the mayor signed the ordinance at the time; (3) if the ordinance was invalid because improperly passed, was the assessment valid and binding under authority of another ordinance? and (4) whether the assessment was invalid because the property involved received no benefit from the improvement. Findings and judgment were in favor of the plaintiff, and the city appeals.

The appellant assigns twelve errors as grounds for reversal, but those above enumerated are the only ones urged at the hearing and necessary to consider.

The validity of other like assessments levied under this same project has been before this court on two previous occasions. *Rooney v. City of South Sioux City*, 111 Neb. 1; *Sioux City Bridge Co. v. City of South Sioux City*, 112 Neb. 271. In both of these cases the assessments were held invalid and void for the reason that the mayor did not sign the ordinance and therefore the ordinance never became operative.

City of South Sioux City is a city of the second class, and began proceedings to pave its principal street, and on March 22, 1920, the city council enacted ordinance No. 121 which provided for the improvement. This ordinance did not make provision for paving between the rails of a street railway track, and on April 17, 1920, the council passed ordinance No. 122 which was a duplicate of No. 121 with an additional section making provision for paving between the street-car rails. The assessments involved in this case were made thereafter and the paving constructed and completed. The plaintiff urges (1) that ordinance No. 122 was not signed by the mayor, as required by statute, and therefore void; (2) that the ordinance was not posted or published as required by law; (3) that the "yea" and "nay"

votes of the members of the council were not called and recorded upon the passage of the ordinance; (4) that the ordinance is void because it is confiscatory, and because the paving district included all the property within the city limits, and also authorizing paving of several different streets; and (5) that the assessments are in excess of benefits to the affected. Several other charges were also directed against the assessments.

The city, by its pleading and evidence, defends the assessment by denying that the mayor did not sign the ordinance, or that the "yea" and "nay" votes of the councilmen were not called and recorded, and further claims that, even if ordinance No. 122 be held invalid, the assessment is valid under authority of ordinance No. 121, and also general authority under the statutes.

Ordinance No. 122 was acted upon by the council on April 17, 1920. The minutes of that meeting do not show that the mayor signed the ordinance, and this court in the two previous cases heretofore mentioned has so held. Subsequent to those decisions, it is claimed by the city that the original ordinance had been lost, but that it had, in fact, been properly signed by the mayor, and on November 1, 1921, after the city had elected a new mayor and part, at least, of the council were of a different personnel, passed a general resolution which in effect stated that the mayor had signed the original ordinance, and that the "yea" and "nay" vote of the councilmen had been taken on April 17, 1920, and proceeded to correct the minutes of the April meeting accordingly. The city offered the oral testimony of the former mayor that he did sign the ordinance, and also of the city engineer, and one or two others, to the effect that they were present and saw the mayor actually sign the original. The city engineer testified that he particularly remembered it because the mayor had borrowed his fountain pen which was then filled with green ink, and that some comment was made at the time of the fact that the mayor was using green ink. The city urged that such oral testimony is admissible to prove the actual facts, and

that such a *nunc pro tunc* order was proper and conclusive.

It is a noticeable condition in this case that all of the proceedings of the council apparently were found in the book of records except this particular ordinance. Also a "yea" and "nay" voting record was made on all other actions taken. It is also a glaring fact that on two previous trials in this court on this same assessment no suggestion was made that the original ordinance had been lost. This situation cannot be overlooked by a reading and study of the record in this case. In the face of that situation, the council on November 1, 1921, eighteen months later, when a new mayor had been elected and in office and at least a large part of the personnel of the council had changed, passed a resolution correcting the minutes of the meeting held eighteen months earlier to state that the mayor did in fact sign the ordinance, and that the "yea" and "nay" vote was taken. The council, or a like body, does have the power to correct its minutes to show the actual facts, if done within a reasonable time. "But such a proceeding is fraught with so much danger that the rule should be administered with caution, the alleged unrecorded proceeding not being held established without clear evidence thereof. The presumption is, where no record of proceedings of a municipal council exists, that none took place. So also * * * where it does not appear on the record whether some mandatory requirement of statute in respect to procedure was or was not complied with, although regularity will be presumed, failure to comply with the statute may be shown by extrinsic evidence." 19 R. C. L. 903, sec. 202. The statutes require the record of a "yea" and "nay" vote of the council. Section 4331, Comp. St. 1922. To permit the record as made at the time to be changed by parol testimony would amount to a judicial repeal of a legislative enactment. *Farmers Telephone Co. v. Town of Washta,* 157 Ia. 447. This very ordinance required, as a condition to its enactment, that the mayor should sign. The record of both requirements should be

so plain that the interested citizens or successors in office could have no doubt of the action taken. It is to prevent just such a condition as we find in this case that the requirement of a complete record is made mandatory by the statutes. The temptation to correct an omission or oversight is not always irresistible, and in matters of this kind the record made at the time should control unless the contrary is self-evident and necessary.

We have carefully read all the evidence upon this subject. While the printed statements of the former mayor himself, and others, is to the effect he did sign, the general circumstances in the record strongly indicate that he was mistaken. The trial court who had the witnesses before it and heard them testify must have felt the same, for it specifically held that the mayor did not sign, and that the *nunc pro tunc* order was not sufficient. We affirm that finding.

It is argued by the city that, in the event the court should hold ordinance No. 122 was invalid and void, the assessment should be upheld upon the theory that ordinance No. 121 would still be operative, and that the assessment would be valid under its authority. The answer to that argument, in our opinion, is this: On September 7, 1920, the city council, as shown by the council's minute books, by motion properly adopted and on which there was a record "yea" and "nay" vote taken of each councilman, authorized the required publication of notice to property owners of a meeting of the council to be held on October 18 for the purpose of levying assessments to pay for improvements, "as set forth in ordinance No. 122 of the ordinances of the City of South Sioux City, Nebraska, and that a notice similar to the one attached hereto, marked exhibit A, be printed," etc. Exhibit A, the notice, provided for in the foregoing motion, contained the usual notice to property owners in the district that on October 8, 1920, at 10 o'clock in the morning, the council would meet, "for the purpose of passing a resolution, as provided by law, fixing the valuation of all lots or parcels of land to be assessed, * * *

as set out in ordinance No. 122 of the ordinances of the City of South Sioux City, Nebraska." This notice further set out proceedings that would be taken "as set out in said ordinance No. 122." Therefore, it cannot be disputed that the notice and all actions of the council pertaining to this particular assessment directed property owners' attention only to ordinance No. 122. If the purpose of requiring publication of a notice to property owners affected means anything, it can be only that such owners should take notice that a public body would proceed under the authority mentioned in the notice, and no other. If the council acts under an illegal authority, which would be the case if the ordinance specified was void for any reason, certainly the property owner could not be bound by some authority not mentioned in the notice as published. The city council or village board cannot be permitted to give a notice to taxpayers that they will proceed under a specified and specific ordinance and afterwards uphold their actions on some other authority. The proceeding must be upheld, if at all, solely on authority of the notice given.

The plaintiff also urged that the assessments were unreasonable and far exceeded the benefits to the property involved, and for that reason invalid. We deem it unnecessary to go into that question, in view of the necessity of disposing of the case on other grounds.

For the reasons above stated, the decree of the district court is

AFFIRMED.

IN RE ESTATE OF MARIE BUDER.
H. G. WELLENSIEK, GUARDIAN AD LITEM, APPELLANT, V. MARIA BRITZA, APPELLEE.

FILED MAY 18, 1928. No. 25098.

1. **Executors and Administrators: APPOINTMENT.** Under our laws, no authority exists for the appointment of an administrator when the deceased was a resident of and died in a foreign country, leaving no estate to be administered in this state;

but a transitory right of action granted by the laws of the the United States to recover moneys in the hands of the alien property custodian forms a sufficient basis for the appointment in this state of an administrator for the purpose of prosecuting such action on behalf of the estate of a decedent entitled to such moneys.

2. ———: ———: SITUS OF FUNDS OF ALIENS. Funds belonging to a nonresident decedent in the custody of the alien property custodian are ubiquitous and may be considered as having their situs in any state of the United States.

3. ———: JURISDICTION OF COUNTY COURT. The county court, when such funds are collected, has jurisdiction to determine the persons entitled thereto and to distribute the same.

4. Action. An action or proceeding at law will not be converted into one in equity, merely because the answer sets up an equitable defense to the claim.

5. Appeal: REVIEW. In a law action, where no motion for a new trial is filed, this court on appeal will examine the record only for the purpose of determining whether or not the judgment is supported by the pleadings.

APPEAL from the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

H. G. Wellensiek, for appellant.

Claude S. Wilson and *Albert S. Johnston, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

An opinion was filed in this case January 24, 1928. Both parties have filed motions for rehearing. The motions will be overruled; but upon reconsideration of the case we have concluded that the opinion above mentioned should be withdrawn, and we will now proceed to a disposition of the case.

This is an appeal from a decree of distribution in the estate of Marie Buder, deceased; appellants, by their guardian *ad litem,* claiming to be heirs and entitled to one-

half the estate of the decedent. They were defeated in the county court and also in the district court and have brought the case here for review. The pleadings may be summarized as follows: Appellants, by guardian *ad litem*, filed their petition in the county court alleging that they were widow and children respectively of Christian Buder, since deceased; that said Christian and Maria Britza, *nee* Buder, were the only children and heirs at law of said Marie Buder, and prayed a distribution to them of one-half of the estate as the heirs of Christian Buder.

Maria Britza, appellee, filed an answer and cross-petition in effect admitting that she and Christian were the sole surviving children of Marie Buder, deceased, but alleged that in 1905, upon the death of Carl Buder, husband of Maria Buder, and upon the settlement of his estate, Maria Britza and Christian Buder, together with the widow, Marie Buder, and August Britza, husband of Maria Britza, entered into an agreement upon proper consideration whereby the said Maria Britza waived all her claim as heir in her father's estate, and Christian waived and released all his claims as future heir to his mother's estate; that upon the death of Marie Buder and on August 10, 1920, by the proper court in Germany to settle her estate, it was adjudged and determined that the contract above mentioned was valid, and the court issued its certificate to the effect that Maria Britza was the sole heir of Marie Buder. It was further alleged that January 4, 1924, appellants brought an action in the land court at Cottbus, Germany, against said Maria Britza and her husband to set aside the said certificate of inheritance and for a judgment that they were entitled to receive a share of the estate of said Marie Buder, deceased, and that February 12, 1924, said court entered a decree adjudging that the certificate of inheritance was valid and binding upon said appellants, and that Maria Britza was the sole heir of Marie Buder, and alleged that appellants were thereby estopped from claiming any interest in the estate of Marie Buder, and to deny that Maria Britza is the sole and only heir of said estate;

and prayed for the distribution of the entire estate to her.

The guardian *ad litem* for appellants filed a reply putting in issue generally the allegations of said answer, alleging that said certificate of heirship was false, based upon said alleged written agreement, and denying that said Christian Buder ever signed said agreement, but further alleged that said agreement was made without knowledge and in total ignorance of the bequest to Marie Buder hereinafter mentioned, and was without any consideration, and that the land court of Germany was without jurisdiction, as was also the court issuing the certificate of inheritance.

Marie Buder, the decedent, and Christian Buder were, and all of the parties claiming an interest in the estate are, citizens and residents of Germany and have never resided in the United States. The estate to be distributed consists solely of a legacy from Christian Neuman (the maternal uncle of Marie), who died February 12, 1916, to Marie Buder, decedent, in the sum of $25,000. Carl Buder, husband of Marie, died in 1905; Marie Buder died December 3, 1918, and Christian Buder died February 1, 1921, leaving appellants as his heirs.

The district court found in favor of Maria Britza, and dismissed the appeal of the guardian *ad litem*, and affirmed the judgment of the county court directing that all of the estate be assigned to Maria Britza. No motion for new trial was filed in the district court. The guardian appeals on behalf of his wards.

Copies of the record and proceedings of the German courts, including the certificate of inheritence and judgment of the land court, and a copy of the alleged contract were received in evidence by the district court, over objection of appellants that they were not properly certified or authenticated so as to be receivable in evidence.

The errors claimed and relied upon by appellants relate to rulings of the trial court upon the reception of evidence, the sufficiency of the evidence to support the decree, and the alleged illegality of the contract or release by Christian Buder of all interest in his mother's estate.

At the threshhold of this case, we are required to determine whether it is an action at law or a suit in equity; if an action at law then, in the absence of a motion for a new trial, by numerous decisions of this court, the only question before us is whether or not the judgment is supported by the pleadings, and we will not consider objections to the ruling of the lower court upon the reception of evidence, nor the question of whether or not the evidence is sufficient to support the judgment; *Summers v. Chisholm,* 89 Neb. 324; *Weller v. Sloan,* 91 Neb. 122; *In re Estate of Swan,* 82 Neb. 742, holding in such case that the sufficiency of the evidence is not before us for review. On the other hand, if it is a suit in equity, then we are required to try the same *de novo,* and while the absence of a motion for a new trial prevents consideration of errors in the reception of evidence, nevertheless the question whether or not the judgment is supported by sufficient competent evidence would remain and we would be required to examine the evidence upon that point.

What then is the nature of the case? The only question for the county court to determine was, who were the legal heirs of Marie Buder? This question is purely legal; no equitable considerations affect it, and in the absence of the alleged contract would be perfectly simple. One of the heirs presents the contract claiming that the other heir has thereby waived his right, and the defense to the contract is that it was not signed by the other heir, was without consideration, and was entered into in ignorance of certain facts which had no existence at the time, but occurred some eleven years later. The questions of the signing and consideration of the contract were purely legal, and the subsequent occurrence of unanticipated events, not provided for in the contract, could not affect its validity. It is suggested that, because the answer and cross-petition of appellee contained a plea of estoppel, the action is in equity. This was pleaded purely as matter of defense and did not convert the action from one at law to one in equity. *Raymond v. Toledo, St. L. & K. C. R. Co.,* 57 Ohio St. 271,

in which it was held: "Whether a case is one in equity or at law, does not depend upon the understanding of counsel, or of the trial court, nor upon the form of judgment rendered, but upon the nature of the action as shown by the pleadings." *Kostuba v. Miller,* 137 Mo. 161; *Kronson v. Lipschitz,* 68 N. J. Eq. 367; *Barnard v. German American Seminary,* 49 Mich. 444, in which it was said by Cooley, J.: "Courts of equity recognize them (estoppels *in pais*) in cases of equitable cognizance; but the courts of common law just as readily and freely"—citing cases. We are clearly of the opinion that this is an action at law, and that the only question for our determination would be whether the pleadings support the judgment. This would be answered in the affirmative, unless it must be held as a matter of law that the alleged contract which forms the basis of the decree is illegal, it being a release of a mere expectancy, and not of a present vested interest.

At common law such a release was void, but enforceable in equity if fairly made and supported by a sufficient consideration, upon the ground of estoppel. There is in this country some conflict in the authorities. A valuable discussion of the question is found in 9 R. C. L. 133-147. At page 143 (section 148) it is said:

"In passing on the question of the validity of an assignment or release of an expectancy by a prospective heir, the courts have not always distinguished clearly between the legal effect of the sale of his expectancy by a prospective heir to a stranger or person other than the ancestor, and the legal effect of a release of his expectancy by the heir to the ancestor himself. This apparent confusion of the two transactions is noticeable in the modern cases holding inoperative releases by prospective heirs to their ancestors"—citing note, Ann. Cas. 1913B, 451. "At common law a child could not release his interest in his parent's estate, because as he might never be the heir of his parent, he thus was considered as having nothing to release. This seems to be still the rule in some jurisdictions. But under the modern doctrine in most jurisdictions, such releases

will be enforced if fairly made and sustained by sufficient consideration. They usually operate by way of estoppel, and it has been held that this equitable defense by way of estoppel is cognizable by the court of probate."

We may assume, without examining the record, that the allegation of sufficient consideration for the contract in question was sustained by sufficient evidence to support the decree of the district court. The defense of estoppel was as cognizable by a court of law as one of equity. *Barnard v. German American Seminary, supra.* If the contract in question was valid either at law or in equity, it was a complete defense to claims of appellant. Furthermore, by the decree of the German court in the action brought by appellants, appellees are estopped to question the validity of the contract. And in 9 R. C. L. 144, sec. 149, the minority rule is stated: "In a few jurisdictions releases of expectancies of inheritance are not recognized, or at least are of questionable validity."

The legal situs of the fund constituting the legacy in question is in Germany, the domicile of the legatee under the familiar legal fiction that the situs of personal property follows the person. The actual fund is in this country and was in the hands of the alien property custodian at Washington at the time the administrator of the estate of Marie Buder was appointed in Clay county. Marie Buder died before receiving the legacy and, war with Germany intervening, payment was made to the alien property custodian by the executor of the estate of Christian Neuman. While Marie had no domicile in this state, nor any real or personal property actually located in Clay county where the administrator of her estate was appointed, and while Marie died at her domicile in Germany, there was at the time of her death a fund in the hands of the alien property custodian, to be distributed to her heirs when released by authority of the United States. This authority was given by section 3115½e, U. S. Comp. St. 1918, as amended March 4, 1923 (1925 Supp. to U. S. Comp. St. 207), permitting actions to be brought in the federal courts for the

recovery of funds in the hands of the custodian, and providing that the moneys shall be paid only to an administrator of the estate of a deceased claimant, appointed in the United States.

We think the county court of Clay county had jurisdiction to appoint the administrator in this proceeding for two reasons: (1) The fund in the hands of the custodian was ubiquitous, *i.e.*, it had its location in any state or county within the United States, and therefore was, constructively at least, in Clay county, which was a quite appropriate place to initiate these proceedings as the county from which the fund was taken in the first place by the custodian. *United States v. Tyndale*, 116 Fed. 820. And (2) the act above cited gave a cause of action, transitory in its nature, to the claimants of the fund, which presents a situation in line with our holdings in *Missouri P. R. Co. v. Lewis*, 24 Neb. 848, and *Missouri P. R. Co. v. Bradley*, 51 Neb. 596. The right of action so granted was sufficient to satisfy the requirement of the statute that a nonresident have property in this state to be administered. Having jurisdiction that court had the right, and it was required, to determine who were the heirs entitled to the estate and to make distribution thereof.

We conclude that the only question before us is whether the decree of the district court is supported by the pleadings, as to which there seems to be no question; and, therefore, our former opinion reversing the case for want of sufficient competent evidence to support the decree must be set aside. The effect of that opinion was to grant a new trial for reasons not open to our consideration in the absence of a motion for new trial.

It is therefore ordered that our former opinion be withdrawn and the judgment of the district court be affirmed in all particulars, and said district court directed to certify its decree to the county court of Clay county for further proceedings in conformity to this opinion.

AFFIRMED.

ALBERT H. BURKAMP, APPELLEE, V. ROBERTS SANITARY DAIRY, APPELLANT.

FILED MAY 18, 1928. No. 25805.

1. **Negligence**: QUESTION FOR JURY: TRAFFIC REGULATIONS. The violation of an ordinance or statute requiring automobiles and other vehicles to drive to the right of the center of the highway does not constitute negligence *per se*, or as a matter of law; but whether or not such violation constituted negligence is a question for the jury under proper instructions.
2. ———: ———: ———. The same rule is applicable to the violation of an ordinance requiring vehicles to display lights.
3. **Damages**: INSTRUCTIONS. An instruction is erroneous which tells the jury that, in fixing plaintiff's damages in a personal injury action, they may consider the pain and suffering which plaintiff "will probably suffer in the future;" only such pain and suffering as the evidence shows with reasonable certainty plaintiff will experience in the future may be considered by the jury.
4. **Courts**. Under the statute providing for the appointment of a supreme court commission, the decisions of such commission "shall establish no precedent and be authority only in the particular case."

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

Ziegler & Dunn, George W. Becker and *J. W. Weingarten*, for appellant.

Leon, Stalmaster & Beber, contra.

Heard before GOSS, C. J., ROSE, THOMPSON, EBERLY and HOWELL, JJ., and REDICK and WHEELER, District Judges.

REDICK, District Judge.

The appeal in this case was heard before the supreme court commission, division No. 1, and an opinion rendered reversing the judgment of the lower court for error in the instructions. That opinion was approved by the court; upon which the plaintiff, appellee, filed a motion for rehearing, which was granted, and the case has been heard anew by the court. The action is for damages for personal inju-

ries to plaintiff and damage to his automobile, growing out of a collision with the milk wagon of defendant driven by its servant on one of the boulevards of the city of Omaha. Plaintiff recovered a judgment in the court below, and defendant appeals.

Among the grounds of negligence alleged are: (1) That defendant's servant, at the time of the accident, was driving upon the left or wrong side of the road, contrary to an ordinance of the city of Omaha; (2) that defendant's servant failed to keep a proper lookout for approaching vehicles; and (3) that defendant's servant failed to display a light at the front of his wagon as required by an ordinance of the city of Omaha.

The accident occurred on December 25, 1925, at about 4 o'clock in the morning, the plaintiff driving south and colliding head-on with defendant's wagon coming north.

The instructions complained of are Nos. 6, 7, 8, and 16. Instruction No. 6 is in the following language:

"You are instructed that it is provided by an ordinance of the city of Omaha with respect to the travel and traffic upon its public highways, among other things, as follows: 'Vehicles in motion shall keep between the curb to the right and the center of the highway.'

"It is also provided by the laws of this state that no motor vehicle shall be operated within any city, at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person.

"You are instructed that these are valid provisions of law, and that it was the duty of the plaintiff and of the driver of the defendant's wagon to obey the same at the time of the accident. The defendant is not liable in this action simply and solely because its team and wagon were on the left-hand side or the west side of the boulevard, as they proceeded north, if you find that they were on the left-hand or west side of the roadway. But if you find that at the time of the accident defendant's horses and

milk wagon or either thereof were on the wrong side of the boulevard, *i.e.*, between the curb on the left and the center of the road, and that such fact was the sole cause of the accident, and that plaintiff was not negligent upon his part, then it will be your duty to return a verdict in favor of the plaintiff, for the damages he has sustained. And, if you find that the defendant's wagon or horses were on the left-hand side of the road, *i.e.*, between the left curb and the center, and that such fact was not the sole and exclusive cause of the accident, but did contribute to cause the accident, such fact would constitute negligence upon the part of the defendant, the degree of which and the effect of which will be for you to determine under the evidence and these instructions."

Instruction No. 7 told the jury that, if the defendant failed to comply substantially with the ordinance as to the display of a light, and that "its failure so to do was the sole and exclusive cause of the accident, and plaintiff was not negligent on his part, then the plaintiff is entitled to recover his damages sustained."

Instruction No. 8 told the jury that it was the duty of the driver of the milk wagon to use ordinary and reasonable care in keeping a proper lookout for approaching vehicles, "and if he failed so to do, and the accident was occasioned solely and exclusively because of any such failure on his part, and the plaintiff was not negligent in any respect, then the defendant would be liable for any damages sustained by the plaintiff." It further told the jury that it was the duty of the driver to use ordinary care in guiding his horses and keep them to the right of the center of the highway, and "if he failed in this respect, and such failure in any way contributed to occasion the accident, such failure would be negligence on the part of the defendant, the extent and degree and effect of which will be for you to determine under instructions hereinafter given you."

The question for determination is whether these instructions violate the well-established rule in this jurisdiction

that, except in cases where a statute imposes upon the defendant a mandatory duty to do some act for the protection or safety of individuals or property, the question whether or not the violation of an ordinance or statute amounted to actionable negligence is one for the jury, under proper instructions of the court, and does not ordinarily amount to negligence *per se*, or as a matter of law. The rule was clearly announced, after elaborate consideration of the cases, in *Stevens v. Luther*, 105 Neb. 184, where the case of *Walker v. Klopp*, 99 Neb. 794, announcing the opposite rule was disapproved, and the proper rule stated to be that, subject to the exceptions noted, the violation of a statute or ordinance is evidence of negligence, which the jury is entitled to consider in connection with all other evidence in the case. It is true that in the *Luther* case the court instructed the jury that a person violating the statute fixing the rate of speed for automobiles is guilty of negligence as a matter of law, but the objection to the instruction was not upon the grounds now under consideration. The contention of counsel there was: "If the court imparts to the jury the statute regulating the speed of automobiles, it should then say to the jury: 'It is for you to determine whether or not the excess rate of speed, if you find it was in excess of that fixed by statute, contributed to the injury, under all the facts and circumstances of the case.'" This did not challenge the correctness of the instruction as to negligence, and the criticism as made was held to be fully answered by the concluding part of the instruction, whereby the jury were told that it was for them "to determine the degree or amount of such negligence under these instructions, in view of all the facts and circumstances and other acts of negligence, if any, proved at the trial, and to determine whether such negligence was the proximate cause of, or contributed to the accident."

In *Dorrance v. Omaha & C. B. Street R. Co.*, 105 Neb. 196, the rule is again stated and an instruction approved telling the jury: "You are at liberty to take any such vi-

olation (of ordinance or statute) into consideration, along with all the other evidence in the case, in determining whether or not the party so violating the same was chargeable with negligence in and about the accident." And in *Taylor v. Koukal*, 107 Neb. 409, it was held that an instruction which informs the jury without qualification, that a failure to comply with an ordinance requiring lights to be exhibited on motor vehicles between certain hours, in itself, constitutes negligence, is erroneous. See, also, *Thomas v. Rasmussen*, 106 Neb. 442.

Counsel for appellee state that they have no complaint of the doctrine announced in these cases, but insist that they go no further than to say that an instruction is erroneous only when it tells the jury, *without qualification*, that the violation of an ordinance is negligence; and contend that the proper qualification was present in the instruction under consideration in the words, "such fact would constitute negligence upon the part of the defendant, *'the degree of which and the effect of which will be for you to determine under the evidence and these instructions.'*" The difficulty with this proposition is that the court deprives the jury of consideration of the question whether or not the act proved was in fact negligence, and leaves to them to determine only the degree or effect of such negligence. The court did not permit the jury to determine whether or not driving on the wrong side of the road, or failure to display a light, were negligent acts, but closed the door as to the quality of the acts. There is a wide difference between the determination of the existence of a fact, and the degree or effect of it when the fact is established. Instruction No. 7 did not contain the clause claimed as a qualification.

Defendant calls attention to the case of *Northrup v. Nystrom*, No. 25656, in which an instruction substantially in the language of No. 6 in the present case was sustained in an opinion by the supreme court commission No. 1 and approved by this court, the instruction having been given by the same district judge as in the present case. We will

not attempt to distinguish (if it can be distinguished) that case from the present one. It is only necessary to call to counsel's attention the provision of section 2, ch. 76, Laws, 1925, to the effect that "such proceedings (of the commission) shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case." While such decisions are entitled to great respect and generally announce correct principles of law, the legislature has denied them the force of precedents in other cases. It is to be very much regretted that the decision of the commission, which is composed of able men, learned in the law, should be found to run counter to the settled doctrine of the court and receive the approval of the latter. The probable explanation of the occurrence being the congested condition of the docket and the extraordinary burdens consequent thereon upon the court.

Counsel also cite *Whitlow v. Missouri P. R. Co.*, 94 Neb. 649, where the court instructed the jury that, if "the whistle was not sounded nor the bell rung, as required by the statute, and that the accident complained of was caused by the failure so to ring the bell or blow the whistle, and without any fault on the part of the plaintiff or his employee or servant who was at that time in charge of the property injured, then you should find for the plaintiff." In that case the precise question under consideration was not presented. The objection to the instruction was that it excluded from the consideration of the jury any and all other facts related to the case. But this contention was refuted, as held by the court, by the provision of the instruction that the accident occurred without any fault or negligence on the part of plaintiff or his employee or servant. Moreover, by the second syllabus the rule was announced substantially as herein given, as follows: "While the court may say what act or omission of a party is evidence of negligence, it is for the jury to say what conclusion such evidence warrants."

Instruction No. 6 above quoted was erroneous in that it

informed the jury that the act of defendant's servant in driving on the left-hand side of the road, whether the sole or contributing cause of the accident, was negligence *per se*. The same is true of instruction No. 7 and the latter portion of instruction No. 8. In both No. 6 and No. 7 the jury were instructed that the defendant was not liable simply and solely because his servant did not comply with the ordinances respectively concerned. This was a correct statement of the law, but is inconsistant with the other portions of the instructions to which our criticism is addressed.

One other assignment of error is necessary to be considered. By instruction No. 16 upon the measure of damages, the jury were told that they might consider "any physical or mental pain or anguish which the plaintiff has suffered because of his injuries, or any pain that he still suffers, or will probably suffer in the future." This was error in so far as it permitted the jury to allow damages for pain which the plaintiff will "probably suffer in the future." This language is too indefinite and conjectural. The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience. *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170.

We conclude that the disposition of the case by the commission was correct and that our former judgment should stand.

REVERSED.

OTTO E. LINDBURG, APPELLEE, V. JOHN R. BENNETT ET AL., APPELLANTS.

FILED MAY 28, 1928. No. 25640.

1. **Counties:** SALE OF REALTY. Under section 853, Comp. St. 1922, as amended in 1925, a county board has no power to sell any real estate owned by the county and costing over $1,000, without a vote of the electors of the county.

2. ———: LEASE OF REALTY. Under the powers given the county board by statute, the board has the general power to lease real estate owned by the county.
3. ———: ———: INJUNCTION. A county board will not be enjoined from leasing, for a term of 99 years, real estate owned by the county but not actually used by it nor needed for its actual uses, where there is no fraud involved, where the consideration is adequate, and where the covenants and provisions of the lease protect the interests of the county.
4. ———: ———. In the circumstances recited in the last paragraph above, a 99-year lease is not equivalent to a sale of the property.
5. ———: SALE OF REALTY: OPTION. The option of Lincoln Post No. 3 of the American Legion to purchase the real estate in case of a contemplated sale examined and discussed; *held*, under the record, that it is not operative because no sale of real estate is involved here.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed, with directions.*

Hainer, Flansburg & Lee, Peterson & Devoe, Max G. Towle, A. Farley Young, George I. Craven and *C. J. Campbell*, for appellants.

Clark Jeary, Clarence G. Miles and *J. C. McReynolds, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, and THOMPSON, JJ., and LANDIS, District Judge.

GOSS, C. J.

This is an equity suit in which the district court decreed that a 99-year lease of certain real property made by the county to two of the individual defendants was invalid. The county and the lessees appealed.

The suit to enjoin the performance of the lease was brought by a taxpayer, who alleged, in substance, that the county of Lancaster has long owned in fee lots four (4), five (5) and six (6), block ninety (90), Original Plat to the city of Lincoln, and that said property is commonly

known as the "City Auditorium;" that on July 7, 1925, the defendant county commissioners entered into a written lease of said premises for the term of 99 years with the defendants O'Shea and Rogers; that the same is in effect a sale of said premises, that such a sale cannot be made without a vote of the electors of the county, but that the matter has never been submitted to such a vote. Plaintiff prayed for an injunction preventing the lessees from entering upon the premises and for a decree declaring the acts of the county commissioners void and quieting the title in the county. The defendants, O'Shea and Rogers, answered, alleging that the county took the lots as part settlement of the shortage of a county treasurer in 1896, has ever since held the fee simple title, has, on occasions specified in the answer, leased the premises to other parties, with the history thereof, that it was leased to these answering defendants as shown by the copy of the lease attached to the petition, that they intend to carry out the provisions of the lease, and praying for a dismissal. Lincoln Post No. 3 of the American Legion, hereinafter called the Legion, as intervening defendant and cross-petitioner, pleaded that on February 19, 1925, the county, "the same not being its public grounds," leased the premises to it for a term of five (5) years from August 13, 1924, that the written lease gave the Legion a valid option during its term to buy the property at the price and on the terms of any contemplated sale to other parties, that it elected to exercise its option to take over the property on the terms of the O'Shea and Rogers "contemplated sale," as described in the petition, that the county commissioners and others seek by fraud and collusion to avoid cross-petitioner's contractual rights, and prayed specific performance of its option agreement. The Legion's pleading included W. Bruce Shurtleff and Charles Olson in its title as defendants and so refers to them in the body of the cross-petition, but we are unable to discover from the transcript in what manner they were made actual and formal parties to the suit in the lower court, but they participated as defendants in some of the

pleadings; and the amended præcipe filed by appellants lists them as defendants, as does also the præcipe of the cross-appellant Gee. George S. Gee also intervened somewhere along the line, also not shown by the transcript, as a citizen and taxpayer, in opposition to the O'Shea-Rogers lease. He alleged, among other things, that the real estate in question has become and is public grounds and cannot be sold or otherwise disposed of without a vote of the electors, alleged collusion to prevent bidding and competition, and prayed either that the Legion's prayer for a right to purchase under its option be confirmed, or that the O'Shea-Rogers agreement be declared void. The county commissioners answered separately, setting up the acquirement of the property, the history of its uses and income, that the property was never used for governmental purposes, that the lease to O'Shea-Rogers was expressly made subject to the existing lease of the Legion and is not a sale of the property, and prayed a dismissal. The foregoing merely sketches the main points of the voluminous pleadings in order to give a view of the issues as raised by the various parties.

A brief history of the case, condensed from the extended evidence, will help us to diagnose the case and will aid the reader to understand it. On March 24, 1896, a shortage of $36,000 was discovered in the official accounts of one who was then and for some time had been treasurer of Lancaster county. Soon thereafter he died. The claim of the county against his estate was allowed in full. Suit was brought in the district court against the bondsmen of the treasurer, naming also the representative of his estate as a defendant, to recover the shortage, and a settlement was made, with the approval of the county court, by which notes held by the treasurer and secured by mortgage on the lots in question were turned over to the county. Thereupon, and as a part of the settlement, the holder of the title conveyed the lots to the county, to satisfy his debt evidenced by the notes and secured by this mortgage. In the settlement the liability of the estate on the short-

age was credited in the sum of $13,546.56, which was the agreed value of the notes for the purpose of settlement. The county obtained a fee simple title by which it has ever since held and still holds the lots. The county has never used this real estate for any purpose other than to lease it for whatever revenue it could obtain in the ways hereinafter set forth. On September 5, 1899, the county executed a written lease, with the Lincoln Auditorium Association as lessee, to run 25 years from September 1, 1899, by the terms of which the lessee agreed to erect upon the lots an auditorium seating 3,400 people, at a cost of $15,000, to pay all special taxes, to furnish the auditorium free for all county and district political conventions and at cost to all city political conventions, to share equally with the county the net profits, divisible each three years, and at the end of the term all buildings, improvements and fixtures were to be turned over to the county, free of incumbrance. There were no profits and, the county consenting, the lease was surrendered in writing on February 20, 1903. On February 19, 1903, the county commissioners leased the premises to the Union Commercial Club for 50 years at $350 a year, the county board having on the same day, by a resolution, decided that the property was worth $8,000 and that the rental named would produce a higher rate of income than the county had to pay on bonds for borrowed money. The written lease provided that the club might erect on the premises a brick building for the use of the Commercial Club and at the termination of the lease the brick building, the auditorium, and all other buildings constructed on the premises by the lessee, its successors or assigns, should remain the property of the lessee and be removed. In 1904 the Union Commercial Club transferred this lease to the Lincoln Commercial Club. In 1919 the Commercial Club made a settlement with the county on account of its unpaid rent, and, by resolutions both of the county and of the club, the lease of 1903 was canceled. On August 13, 1919, the county leased the property in writing to the city of Lincoln for

the term of five years, at an annual rental of $350. On February 19, 1924, the county of Lancaster leased the premises in writing to Lincoln Post No. 3, American Legion, of Lincoln, Nebraska, for the term of five years from August 13, 1924, at a rental of $350 a year, to be paid on February 1 of each year, the lessee to pay all special taxes or assessments before delinquency. The lease contained, among other things, this provision:

"It is further agreed that the party of the first part (the county) shall have the right to sell the premises herein described, provided, however, that notice of such contemplated sale shall be given in writing to the party of the second part (the Legion) at least one year prior to the time fixed for the vacation of said premises by the party of the second part, and provided, further, that during such period the party of the second part shall have option to itself take over and buy the premises at the price and on the terms of such contemplated sale."

An examination of all the leases of this property ever made by the county prior to the one in suit shows that they all contained reservations of permission to use the premises by political conventions and that none of them required the payment by the lessees of any general taxes. The evidence shows that the gross rentals received from the property from the time it was acquired in 1896 up to July 7, 1925, amounted to $5,954.60, and during that period the amount paid out on account of the property a total of $928.50. It may be remarked that the spirit of the leases, and the uses for which they required the property to be reserved in part, did not look toward revenue as a main end. On July 7, 1925, the county, by its commissioners, leased said premises to the defendants, E. M. O'Shea and R. H. Rogers, for a full term of 99 years, beginning on the 7th day of July, 1925 (subject to the Legion lease, which will expire August 13, 1929), for a yearly rental of $4,000 from and after the expiration of the Legion lease. The written lease was duly executed and acknowledged by all parties thereto and was filed, all on

July 7, 1925. The lessees covenanted to pay all rates, taxes and assessments of every kind, that on or before 18 months after the expiration or termination of the Legion lease they would commence the construction of a modern fireproof building upon the premises, at least two stories in height, with foundations capable of sustaining a building eight stories in height, the building to be completed not later than one year after the commencement thereof, and to cost not less than $100,000, and to furnish a $25,000 bond to be approved by the county to insure the commencement and erection of said building. The lease is too long to abstract, but it contains the modern conventional provisions of 99-year leases. It may be noted that it contains no revaluation clause. It was made after wide publicity had been given the consideration of the matter through the newspapers and otherwise. The evidence shows that the proposed lease was widely discussed in the daily papers of the city both editorially and as news and that one of them published the proposed lease in full. It was the best offer, and apparently the only actual offer, received up to the time of the execution and delivery of the lease.

At the conclusion of the trial before the court, the court found that the county commissioners were without power to enter into the 99-year lease; that the contract is *ultra vires* and void; that the premises are public grounds belonging to Lancaster county within the meaning of the statutes; that the question of entering into said contract has never been submitted to a vote of the electors; that there was no fraud or concealment on the part of the county commissioners and that the consideration for the lease was not so inadequate as to amount to fraud; that there was no fraud in the conduct of the defendants O'Shea and Rogers and Shurtleff and Olson, and that there was no fraud or conspiracy against the Legion to deprive it of its rights under the option contained in its lease. The decree of the court canceled the lease, denied the prayer of the intervener, the Legion, for specific performance, and gave

a judgment for costs in favor of the interveners Gee and the Legion.

The appellants assign that the court erred (1) in holding that the property constituted public grounds and buildings, as distinguished from real estate of the county, within the meaning of the statutes; and therefore erred (2) in holding that the county commissioners had no authority to enter into a lease without a vote of the electors; (3) in holding that the county could not lease this property for 99 years; and (4) in holding that the 99-year lease was a sale or equivalent to a sale under the statute.

At the outset of the discussion, it may be set down that, like the trial court, we find nothing in the evidence to support any charge of active fraud, collusion or conspiracy on the part either of the county commissioners or of the lessees and their associates, or of their attorneys, all of whose conduct, either directly or by implication, is sought to be impugned in some connection or another in briefs and arguments by some of the parties. There appears no unlawful combination or confederation to deprive the county of title to its property or to interfere with the rights of the Legion in the premises. The lessees were seeking a desirable investment and the improvement of this property as an enhancement to their valuable improved property adjoining this on the east, as they had a right to do. The county, through its commissioners, was seeking some use of this property, so long held with meager returns, that would produce a net income commensurate with its value, as it had the right to do. If its commissioners acted within their powers and without fraud, conspiracy or collusion, then the courts cannot and will not interfere and substitute the judgment of the court for the thus exercised discretion of the commissioners. The inquiry here is as to whether they acted within their powers in making the 99-year lease.

So much of the general sections of the statutes as are involved are quoted in this paragraph:

"Each county which has heretofore been, or may here-

after be established in this state, according to the laws thereof, shall be a body politic and corporate." Comp. St. 1922, sec. 848. "Each county shall have power: First. To purchase and hold the real and personal estate necessary for the use of the county, and to purchase and hold for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff or is interested * * * Second. To sell and convey, or lease, any real or personal estate owned by the county. Third. To make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers." Comp. St. 1922, sec. 851. "The powers of the county, as a body corporate politic, shall be exercised by a county board." Comp. St. 1922, sec. 850. A county board has the power: "First. To take and have the care and custody of all the real and personal estate owned by the county." And "Third. * * * To sell the public grounds or buildings of the county, and purchase other properties in lieu thereof." Comp. St. 1922, sec. 852. "Public Grounds. Sale. The county board shall not sell the public grounds as provided in the third subdivision in the preceding section without having first submitted the question of selling such public grounds to a vote of the electors of the county: Provided, in any case where the county has acquired real estate at a cost not to exceed one thousand dollars ($1,000) by gift, purchase or judicial proceedings in which the county is plaintiff or is interested, the county board may sell such real estate without submitting the question to a vote of the electors of the county." Comp. St. 1922, sec. 853, as amended March 31, 1925, Laws 1925, ch. 95, sec. 1. This amendment was in effect when the lease under examination was made.

The appellants argue, from these statutes, in substance, that a county has two qualities or characteristics: First, governmental or politic; and, second, private or proprietary; that such lands and buildings as are necessary to use for the purpose of carrying on the business of the county

are used in its governmental capacity, are therefore described in the statutes as "public grounds and buildings" and cannot be sold and conveyed without a vote of the electors; while such real estate as is acquired and held as an asset of the county, but not for physical and governmental use, is held in its private or proprietary capacity, and may, under section 851, aided by following sections, be sold and conveyed by the county board in the exercise of its judgment and discretion without a vote of the electors. They concede that a courthouse and grounds and a poor-farm are public grounds and buildings, but assert that real estate taken in settlement of a debt, as this was, and not used by the county in the exercise of any governmental function, is held under proprietary powers. On the other hand, the appellees contend that all such property costing over $1,000 is public grounds and buildings, and cannot be sold without a vote of the electors. They further insist that the 99-year lease of the property in question is equivalent to a sale thereof.

The appellants cite a previous case in this court, involving a 50-year lease of this identical property, as binding authority that this is not public grounds and buildings and that there is no limitation on the powers of the county board to make the lease. *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87. We find ourselves unable to accord with the expressed views of appellants as to the present effect of that case for two reasons: First, the opinion by Judge Letton shows (page 92) that the parties there agreed that the lots "were not 'public grounds' of the county, and that the board of county commissioners had the power, without first submitting the question to a vote of the electors of the county, to enter into the first lease, and afterwards, with the consent of the lessee, to cancel and set aside the same and release the property for the term of 50 years," so that case was considered and decided on other grounds than those under consideration here; and second, when that case was up in 1910, the legislature had not amended section 853, as heretofore shown

it did in 1925, so as to give at least some indication of legislative policy as to what lands owned by a county may not be sold by the county board without the authority of a vote of the electors.

Appellants assert that the phrase "body politic and corporate" as found in sections 848 and 850 is indicative of two distinct powers or qualities found in counties; that when the members of the county board deal with governmental matters they are acting as agents of the county in exercising its functions as a "body politic," but where they deal with other matters they act as agents of the county in exercising its functions as a "body corporate." Specifically they apply their theory and definitions here by saying that such lands as the county holds for the actual use of the county, like the courthouse and grounds and the poor-farm and buildings, it holds in its governmental capacity as a "body politic" and such are therefore "public grounds and buildings;" but such "lands" as the county otherwise holds, it holds as a proprietor in its corporate capacity as a "body corporate." From historical sources of the derivation of the term "body politic and corporate," as applied to a county, and from the term itself, we do not find support for splitting up the phrase. It is conjunctive rather than disjunctive.

In 2 Coke, Littleton, sec. 413, the learned author, in discussing bodies politic and corporate, says: "This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by Littleton a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, etc. And this body politike, or incorporate, may commence, and be established three manner of ways, viz., by prescription, by letters patented, or by act of parliament."

"Bodies *politic and corporate* had been known to exist as far back at least as the time of Cicero; and Gaius traces them back even to the laws of Solon of Athens, who lived

some five hundred years before." *Warner & Ray v. Beers*, 23 Wend. (N. Y.) 103, 122.

The definition of "body politic" found in the preamble of the Massachusetts Constitution is widely quoted. "The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good." While the definition was prescribed for a commonwealth, the principle is quite applicable to the body of the people set apart in a county or a city to be a state agency or a unit for the purpose of certain local governmental functions.

That a county, even though a body politic and corporate, is a creature of statute and has only such powers as the legislature has conferred upon it is almost axiomatic. These powers are executed by the county board. The board of county commissioners has such powers as are specifically conferred on it by statute and such other incidental powers as are necessary to carry into effect the powers expressly granted. *Lancaster County v. Green*, 54 Neb. 98; *Berryman v. Schalander*, 85 Neb. 281. So it is more of an academic question here as to whether the county holds any certain real estate as a proprietor in a corporate capacity or as to whether it holds it in its governmental capacity. The question arises rather when it seeks to make disposition or use of property, whether the legislature has clothed the county board with the power, in the particular instance, to execute what they conceive to be within their functions. It is true that, where county real estate is devoted to actual public use, it has attached to it a governmental character or quality such as to cause it to be distinguished as public grounds; and where it is not used for such public purposes the county might well be said to hold it as a proprietor. In other words, we are of the opinion that, when a county holds or undertakes to dispose of any of its lands, the measure of its powers is not found solely in the inherent character of the lands, but

rather in the statutes giving the power to hold, and the power to make disposal, and in the general rules of law if and where the statute is not otherwise restrictive. In this connection, the appellees cite a suit brought against the county commissioners of Douglas county to compel them to provide rooms in the county courthouse for the municipal court of the city of Omaha, where it was laid down as the law applicable to such a situation that "A county does not possess the double governmental and private character that cities do. It is governmental in character only, and in that capacity acts purely as an agent of the state." *State v. Board of County Commissioners*, 109 Neb. 35. There the learned judge was writing an opinion involving county real estate in the form of a courthouse and grounds, but he was describing the character of the county rather than the character of the property. That the county acts purely as an agent of the state, as was there declared, is support for what we are saying here. Had lands like those of the instant case been involved, that opinion might well have given the same description of the character of a county and applied the same rule that, as the opinion said in direct connection with what we have quoted from it: "Property of the county, acquired by funds raised through taxation, is property of which the state can direct the use, management and disposition, so long at least as this is done for the benefit of the public."

The second subdivision of section 851 gave the county power "to sell * * * any real or personal estate owned by the county;" not only did section 850 say that the powers of the county should be exercised by the county board, but the third subdivision of section 852 gave the county board the power "to sell the public grounds or buildings * * * and purchase other properties in lieu thereof;" and section 853, while originally prohibiting the sale of "the public grounds as provided in the third subdivision of" section 852 without a vote of the electors, yet, as the legislature amended section 853 in 1925, and as that amended section was worded when the lease under consideration was made,

if there previously was any distinction between the "public grounds" of a county and the "real estate" of a county, costing less than $1,000, so far as the right of the commissioners to sell it without a vote of the electors is concerned, that act of the legislature, heretofore quoted, seems to have done away with the distinction. Real estate acquired "by gift, purchase or judicial proceedings" (section 853, as amended) covers all the conceivable ways in which any one may become the owner of real estate. In its most enlarged sense, "purchase" alone includes all lawful acquisition of real estate by any means whatever except by descent. *Watson v. Donnelly & Lynch*, 28 Barb. (N. Y.) 653, 658 (quoting 2 Blackstone, 241); *City of Enterprise v. Smith*, 62 Kan. 815; Tiedeman, Real Property (2d ed.) 659. The county acquired the Auditorium property by purchase. It might be said to have acquired it by judicial proceedings in the settlement of a law action. It cost more than $1,000. The amended statute expressly says it cannot be sold without a vote of the electors. Therefore, we are of the opinion that since section 853 was amended and the amendment became effective three months after the act was approved on March 31, 1925, a county board has no power to sell any real estate owned by the county and costing over $1,000, without a vote of the electors of the county. The legislature has indicated its policy on that subject by placing a limitation on the sale measured by the cost value of the land; and by including all real estate owned by the county in its restrictions of sale. We cannot interpret it otherwise without invading the constitutional department of our state government belonging to the legislature.

The next question to consider is the power of a county board to lease real estate acquired and owned by the county. The distinction between selling and leasing real estate is so well known that it needs little or no discussion. "A lease transfers to the lessee an interest in the realty less than the estate of the lessor, and as a result of such transfer the lessor has a reversion in such realty, while a con-

tract between the vendor and purchaser for the sale of realty binds the vendor to transfer to the purchaser the interest in such realty which the vendor possesses." 39 Cyc. 1175. By section 851 the legislature expressly gave to each county in the state, along with the power of sale, the power to lease any real estate owned by the county; and by section 852 it delegated to the county board the power to take and have the custody of all the real estate owned by the county and to manage the county funds and business except as otherwise specifically provided. We do not find, and counsel have not pointed out to us, any express or specific provisions limiting the powers of the county board as to the leasing of county real estate, though, as we have seen, the legislature has placed express and specific limitations on the powers of the county board as to the selling of county real estate. This would seem to indicate a legislative policy to leave to the county board power to lease such real estate as originally granted in the sections of the statute to which we have referred. Section 853 as amended cannot be said to repeal by implication the power to lease, because it does not treat of leasing in any respect whatever. We see no escape from the conclusion that, under the powers given the county board by statute, the board has the general power to lease real estate owned by the county. We do not wish to be understood that this rule is absolute; but that, if it be honestly exercised, without injury to the uses, interests and welfare of the county, the discretion of the board in leasing county real estate will not be enjoined by the courts.

This leads us to the inquiry as to the effect of a 99-year lease. Is it the equivalent of a sale? The appellees assert that it is and therefore is prohibited by amended section 853. They cite *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, which arose in the potash era of the World War. The company had school land leases of a section of school land. It sought to enjoin the defendants from trespassing and removing the mineral waters from a lake on the land. The defendants answered, setting up a lease from the

commissioner of public lands and buildings, granting for three years the right to enter upon and occupy the premises "for the purpose of prospecting for minerals, petroleum, gas, potash, or other valuable substances." The trial court refused an injunction, but this court reversed the judgment of the district court because the plaintiff was entitled to the use of the school lands under its leases and because the legislature had never conferred "upon the board power to vest others with the right to enter upon the lands and remove the minerals therefrom." It is true the court concluded that the lease was a chattel real, and the minerals sought to be removed, being defined in the statute as real estate, must be considered in that light. To allow them to be removed under the defendants' mineral lease would not only be waste and thus violative of the terms of the school land leases of plaintiff but would be equivalent to allowing real estate to be sold. As we understand the decision, it does not attempt to distinguish between a lease and a sale generally, but holds that, without express authority from the legislature, the board has no power to execute such a lease as the one there under consideration.

The various appellees, in numerous briefs, cite too many cases to make it possible to take up and discuss them separately. But this is the substance of their argument to convince that the lease in question results in a sale and conveyance of the property: Under section 5586, Comp. St. 1922, defining "real estate," the lease, being for more than one year, is a chattel real and therefore real estate; under section 5587, defining "purchaser," the appellants are purchasers because an interest in real estate is conveyed to them for a valuable consideration; under section 5588 the lease in question is a deed assigning an interest in real estate; therefore, by the lease, the real estate is sought to be sold to the appellants. The main Nebraska case, construing these sections, cited by appellees and discussed at length in several of the briefs, is *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 297. After discussing the above sections and deciding that the lease in

question is a "chattel real" and is therefore real estate and not personal property, as a chattel real is personal property in some states, the opinion proceeds immediately to say: "Whatever view may be taken in some states with reference to the nature and character of such an instrument and of the right to remove minerals from the land, the legislative definition prevails, and the property must be considered as real estate. Without express authority from the legislature, the board has no power to execute such a lease as the one under consideration." The case so much relied upon by appellees, by these last quoted words, confounds their argument. In the instant case, the legislature, in express words of the statute, earlier quoted by us, gave the board authority to lease.

The appellees cite two cases from the supreme court of the state of Washington. There they have a provision in the state Constitution which (1) prohibits the ownership of lands by aliens (with exceptions and provisions not involved here) and which (2) provides that "all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void." In the first case, *State v. Morrison*, 18 Wash. 664, the court, considering a 99-year lease, after stating that it could not find any authority bearing directly upon the question, said: "We have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void." In the second case, *State v. Hudson Land Co.*, 19 Wash. 85, it was held that a lease of land to an alien for 49 years was void since it permitted that to be accomplished indirectly which could not be done directly. The decisions in these two cases were forced by the policy plainly expressed in the Constitution against any ownership of lands with the constitutional prohibition of "all conveyances of lands" to any alien. By reason of the constitutional provisions there, we do not regard these cases as applicable here, where our Constitution contains no such prohibition

and where our statute expressly allows the board to lease real estate owned by the county.

Other cases cited by the appellees, too numerous to analyze in this already extended opinion, find their answer in our statute law applicable to leases of county real estate.

A case very much like the instant case in its facts, and akin to it in the principles involved, arose in Chicago, and ultimately was reviewed in the supreme court. The Tribune Company had occupied under a lease three lots which were school property, the title to which was in the city of Chicago in trust. The company had improved the property with a building which it occupied for its business. The management of the property was vested in a board of education, subject to control by the legislature, and with powers defined by statute. The board had power to lease school lands. In May, 1880, the property was leased to the Tribune Company for 50 years. On June 15, 1888, the company and the school board entered into an agreement extending the lease to May 8, 1985. In 1907 the city of Chicago and the school board brought suit to cancel all the leases and agreements. On evidence and report of a master, the trial court dismissed the bill. Complainants appealed. The Illinois supreme court, in a well-reasoned opinion, affirmed the decree, holding that "A lease for a fixed and definite period, conditioned upon the payment of a fixed annual rental, even though for a long term of years, is a lease and not a sale, notwithstanding the language of the conveyance act and the act relating to judgments, which specifies that long-term leases shall be included within the term 'real estate.'" In the opinion, the court said:

"It is next argued that the leases, as extended until 1985, amounted to a sale of the property, which was beyond the power of the board of education, and the basis of the argument is that the terms were long. Reliance is placed upon the act in regard to judgments, which declares that leasehold estates, when the unexpired term exceeds five years, shall be included in the term 'real estate,' as used

in that act, and also upon the Conveyance act, as including leases like these. The question raised as to the nature or quality of a leasehold estate has little or nothing to do with the question whether these leases constituted a sale of the property. A decision that a lease for a long term is personal property or a chattel real, or real estate proper, would not affect the question whether the instrument is a lease or a sale. Words used in the statute are to be taken in their ordinary acceptation, and a lease, although for a long term, with payments of annual rent, is not a sale, which is a grant of absolute ownership. These leases were for a fixed and determinate period, conditioned upon the payment of fixed annual rental, and have all the characteristics of a lease and none of the features of a sale." *City of Chicago v. Tribune Co.*, 248 Ill. 242, 248.

The parties to that case, the statutes affecting it, and the principles of the common law applicable to it are such as to give it elements unusually common to the case at bar. The reasoning is cogent and is applicable here. On principle and on authority, without prolonging this discussion, we see no logical escape from the conclusion that the 99-year lease made by the county board was not a sale, but was in fact a lease.

The lease is conditioned upon the payment of an adequate annual rental with an agreement for valuable and permanent improvements to be made by the lessees who covenant to pay taxes and assessments of every kind. Upon failure of the lessees to perform its covenants the term ends. It contains no revaluation clause, but the evidence shows that this is not unusual in modern leases of this type. At the end of the term the improvements will belong to the lessor. There was no fraud in its procurement. It was a lease and not a sale and was made on behalf of the lessor within the authority of the law. When so made we cannot interfere with the powers of the board. To substitute our discretion for theirs would usurp functions not committed by the Constitution to the judicial department of our state government.

As a result, we deduce the following: A county board will not be enjoined from leasing, for a term of 99 years, real estate owned by the county but not actually used by it nor needed for its actual uses, where there is no fraud involved, where the consideration is adequate, and where the covenants and provisions of the lease protect the interests of the county. In such circumstances a 99-year lease is not equivalent to a sale of the property.

Having determined that the lease was made with authority and that it is not in effect a sale, it follows that the option of the Legion is ineffectual. It is an option to purchase if a sale be made. No sale being made, the option has nothing to operate on.

For the reasons stated, the judgment of the district court is reversed, with directions to enter a decree validating the lease as binding on all parties to the litigation.

REVERSED.

EMIL LUCKEY, ADMINISTRATOR, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLANTS: T. B. HORD GRAIN COMPANY ET AL., APPELLEES.

FILED MAY 28. 1928. No. 25632.

1. **Death**: REMEDY. The civil remedy by an action against a wrongdoer for negligence resulting in the death of another person did not exist at common law and is a creature of statute.
2. ———: ———: WORKMEN'S COMPENSATION LAW. A wrongdoer who, as "a third person," is liable civilly for negligently causing the death of another person is not relieved to any extent by the workmen's compensation law, but is answerable for the pecuniary loss occasioned by his negligence.
3. **Master and Servant**: INJURY TO SERVANT: RIGHT OF ACTION: SUBROGATION. Under the workmen's compensation law, an employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and the dependents and may bring and prosecute an action against a third person for the latter's negligence where it resulted in personal injury to, but not in the death of, the employee.
4. ———: ———: ———. Where an employer liable for com-

pensation refuses to bring an action against a third person for negligence resulting in personal injury to, but not in the death of, the employee, the latter may sue in his own behalf.

5. ———: ———: ———. Where an employer liable for compensation consents to an action by the employee to recover damages for personal injuries resulting from the negligence of a third person, the consent is equivalent to a refusal by the employer to sue the wrongdoer.

6. **Death:** ACTION: PARTIES. An action against a wrongdoer for negligence resulting in the death of another person must be brought in the name of the latter's personal representative who is the administrator of decedent's estate.

7. ———: ———: WORKMEN'S COMPENSATION LAW. The workmen's compensation law does not create a new, or any, cause of action against a wrongdoer for negligently causing the death of another person, nor authorize the widow of a deceased workman nor the dependents nor the administrator nor the employer to bring or prosecute such an action.

8. ———: ———: SUFFICIENCY OF EVIDENCE. In an action against a wrongdoer for negligence resulting in the death of a third person, the evidential facts and circumstances outlined in the opinion *held* sufficient to raise a question for the jury and to support a verdict in favor of plaintiff.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

C. A. Magaw, Thomas W. Bockes and *Otto F. Walter,* for appellants.

Montgomery, Hall, Young & Johnsen, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

ROSE, J.

This is an action to recover $15,000 in damages for alleged negligence resulting in the death of Joseph Schmidt who left surviving him his dependent widow and six adult children. The administrator of decedent's estate is plaintiff. The Union Pacific Railroad Company, Louis Hostreitter, T. B. Hord Grain Company and Globe In-

demnity Company are defendants. For convenience the Union Pacific Railroad Company and the T. B. Hord Grain Company will be called respectively "railroad company" and "grain company." Hostreitter was an employee of the railroad company and Schmidt was an employee of the grain company. The Globe Indemnity Company was the "insurance carrier" of the grain company.

A tier of grain car doors owned by the railroad company and by it stored in piles in the elevator yard of the grain company at Humphrey fell on Schmidt October 22, 1923, and as a result of his injuries he died October 29, 1923. The doors were placed there for the use of the grain company in coopering grain cars.

Plaintiff in his petition pleaded that grain car doors in excess of current needs were stored by the railroad company on the premises of the grain company; that Hostreitter piled them too high in a negligent manner in violation of duties owing to employees of the grain company and that Schmidt, in due course of his employment and in the exercise of due care, went to the piles to get needed doors for the coopering of grain cars; that, while thus engaged, through the negligence pleaded, a tier of the doors fell on him and fatally injured him; that also as a consequence of such negligence the grain company, and the insurance carrier, became liable to the dependent widow for $15 a week for 350 weeks; that out of the damages recovered in this action the grain company and the insurance carrier will be entitled to compensation already paid and to unpaid instalments for which they are liable.

In an answer and cross-petition the grain company and the insurance carrier admitted the facts pleaded by plaintiff and alleged that by reason of the death of Schmidt his widow and next of kin were damaged to the extent of $15,000 and that out of the sum recovered by plaintiff in this action these answering defendants will be entitled to $5,891.75 on account of their liability to the dependent widow for compensation.

The railroad company and Hostreitter demurred to the

petition and to the cross-petition on the grounds that there is a defect of parties plaintiff; that the action is not prosecuted in the name of the real party in interest; that the grain company and the indemnity company are not proper parties defendant, but, if proper parties, are parties plaintiff.

The demurrer was overruled and the demurrants answered, repeating their demurrer, denying the negligence charged and alleging that the death of Schmidt resulted from his own negligence.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff and against the railroad company and Hostreitter for $2,000. From a judgment on the verdict the judgment defendants appealed. Upon a former hearing in the supreme court the judgment below was reversed and later a reargument was ordered.

It is contended by the railroad company and Hostreitter that the decision below cannot be permitted to stand for the reason that the administrator of decedent's estate is not the proper party plaintiff, being without authority to bring or maintain the action, and that therefore the demurrer should have been sustained and the petition dismissed. The question thus raised was well presented on both sides and requires consideration of a statutory provision in what is known as "Lord Campbell's Act," authorizing an action against a wrongdoer to recover damages for negligence resulting in the death of another person, and also requires consideration of a provision in the workmen's compensation law, an act imposing upon employers liability for compensation to the widow or widower and to the dependents of deceased workmen. Lord Campbell's Act, the earlier of the two statutes, contains among other provisions the following:

"Every such action shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of dam-

ages which the persons in whose behalf the action is brought have sustained, and the avails thereof shall be paid to and distributed among such persons in the same proportions as the personal property of an intestate under the inheritance laws." Comp. St. 1922, sec. 1383.

The workmen's compensation law provides:

"Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation." Comp. St. 1922, sec. 3041.

Emil Luckey, administrator of the estate of Joseph Schmidt, deceased, brought this suit under Lord Campbell's Act, a Nebraska statute authorizing an action against a wrongdoer for negligence resulting in the death of another person, a legislative remedy having no existence at common law. The demurrer asserts that the administrator is not the proper party plaintiff. Lord Campbell's Act, referring to the action and to the deceased person, provides that "It shall be brought by and in the name of his personal representative." Comp. St. 1922, sec. 1383. The workmen's compensation law, a later act recognizing a remedy for the benefit of an employer liable for compensation, provides that, "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person." Comp. St. 1922, sec. 3041. In connection with the two provisions, the decisive

question raised by the demurrer is narrowed to the authority of the administrator to sue the wrongdoer or "third person" who negligently caused the death of the employee. Questions relating to repugnance between the two provisions and to the repeal or modification of the earlier statute are limited to the right of the administrator to bring the suit. How the fund recoverable in the action should be distributed is not necessary to a decision. A wrongdoer who, as a third person, is liable civilly under Lord Campbell's Act for negligently causing the death of another person is not relieved to any extent by the workmen's compensation law. He is answerable for the pecuniary loss occasioned by his negligence. The third persons herein were the railroad company and Hostreitter. They were alleged wrongdoers and were defendants. The grain company or employer and the insurance carrier were also defendants and they consented to the bringing of the action—an affirmative step equivalent to a refusal to sue in their own right. The widow and the next of kin were represented by the administrator. No one entitled to share the avails of the litigation complains of the judgment rendered. It is clear, therefore, that the judgment defendants cannot be subjected to a double recovery, if the judgment below is sustained.

For the purpose of determining the proper party plaintiff in this particular instance the provision of Lord Campbell's Act authorizing decedent's personal representative to bring the action and the provision of the workmen's compensation law relating to subrogation should be construed together with a view to giving effect to both. In construing the workmen's compensation law it was ruled in a recent case:

"The right to bring an action against the third party rests with the employer until such time as the employee can allege and prove that his employer has neglected or refused to institute the action." *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9.

An examination of the opinion therein leads to the con-

clusion that the question now under consideration was not decided. In that case the plaintiff himself was the employee. He was alone attempting to assert in court his own right to recover from a third person damages for negligence. He had been personally injured but not killed. He was in control of his own affairs and of course could not be represented by an administrator. As plaintiff in that case he had no right of any kind under the statute creating for the first time a civil remedy against a wrongdoer for negligently causing the death of another person. He was capable of suing and of being sued. The legislature had made his compensation, when paid by his employer, available for subrogation. In another case wherein an injured employee was himself the plaintiff Judge Letton said in a concurring opinion:

"If the employer, after paying the amount of the statutory compensation, refuses or neglects to bring his action against the negligent third party, this does not deprive the injured person of his right of action against the wrongdoer." *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379.

This language was quoted by the supreme court with approval in *O'Donnell v. Baker Ice Machine Co.*, 114 Neb. 9. The workmen's compensation law and the opinions construing it, therefore, settle the right of an employer who has paid compensation to sue a third person for negligently injuring, but not causing the death of, the employee.

The present appeal presents an entirely different question—Who is the proper plaintiff where the employee loses his life through the negligence of a third person? The administrator of the deceased employee's estate acted in that capacity under Lord Campbell's Act, a Nebraska statute authorizing an action against a wrongdoer for negligence resulting in the death of another person. That act specifically provides: "It shall be brought by and in the name of his personal representative, for the exclusive benefit of the widow or widower and next of kin." No one else is authorized to bring the action. *Wilson v. Bumstead*, 12 Neb. 1. The administrator is the "personal rep-

resentative." *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223. The workmen's compensation law does not create a new, or any, cause of action against a wrongdoer for negligence resulting in the death of another person nor authorize the widow nor the dependents nor the administrator nor the employer to bring or prosecute such an action. That authority is found alone in Lord Campbell's Act. The following rules designate the proper plaintiff under each of the statutory provisions construed:

Where the negligence of a third person results in the death of an employee the administrator is the proper plaintiff in an action for damages under Lord Campbell's Act.

Where the negligence of a third person results in personal injury to, but not in the death of, the employee, the employer, if liable for compensation, is the proper plaintiff under the workmen's compensation law, but in the event of his failure to exercise that right the employee may sue in his own name for damages.

Thus construed there is between the provisions under consideration no repugnance to repeal or modify by implication the authority of the administrator under the earlier statute to act as plaintiff in an action against a wrongdoer or third person for negligently causing the death of another person or employee. In respect to parties plaintiff both enactments are operative. As already stated the appeal does not require consideration of the statutory provisions involving distribution of the recovered fund among the beneficiaries.

It is also argued that in any event the judgment should be reversed for want of evidence to prove actionable negligence resulting in the death of Schmidt, the testimony on the main issue being challenged as speculative and conjectural and as wholly insufficient to prove, or warrant an inference of, the negligence charged. The point does not seem to be well taken. Negligence on the part of Schmidt is not shown. He was found fatally injured under a tier of wooden grain car doors that had fallen upon him. They had not been piled in the usual or customary manner. The

doors were longer than they were wide. Properly piled they should rest on each other crosswise, thus binding them together. In violation of custom and usage the pile that fell on Schmidt was in a single tier with the doors lengthwise. This tier, piled to an unusual height, obviously required little force to throw the center of mass without the base, endangering anyone who attempted to remove a door. Actionable negligence resulting in the fatal injuries was a logical inference from these and other evidential facts. There was therefore no error in submitting that issue to the jury.

Prejudicial error in the rulings on evidence or in the giving and refusing of instructions has not been found in the proceedings upon full consideration of the assignments of error presented. The reversal upon the former hearing is vacated and the judgment of the district court is

AFFIRMED.

THOMPSON, J., dissents.

MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE, V. ARTHUR R. NICHOLS ET AL.: HERMAN E. FAIRCHILD, APPELLANT.

FILED MAY 28, 1928. No. 24886.

1. **Statute of Frauds.** When a person, who is not "thereunto authorized by writing," subscribes the name of another person to a written agreement which creates a "special promise to answer for the debt, default or misdoings of another person," it follows that, under the fraud statute, such "agreement shall be void," as to such person whose name is so thereunto subscribed.
2. ———. The spirit of the fraud statute, having been adopted to prevent fraud, cannot be evaded by mere changes in the language of parties, nor by the form under which the transactions are disguised. Browne, Statute of Frauds (5th ed.) 218.
3. **Principal and Agent:** EXERCISE OF AUTHORITY. "Even when there is express authority for an attorney in fact to bind his principal as surety, it is the policy of the law to construe it strictly and to hold the principal not bound, unless the authority

is exercised within the undoubted limits prescribed." *Clinton v. Hibb's Ex'x*, 202 Ky. 304.

APPEAL from the district court for Jefferson county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Perry & Van Pelt and *Bartos & Bartos*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin and *Denney & Denney, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ.

DEAN, J.

This action was begun by the Massachusetts Bonding & Insurance Company, plaintiff, against defendants Arthur R. Nichols, L. A. Newell, A. F. Newell, H. L. Clarke, and Herman E. Fairchild. The defendants were either officers or directors of the Farmers & Merchants National Bank of Fairbury while it was a going concern. The action, as alleged by plaintiff, is based on an agreement of indemnity executed by the bank as principal and the plaintiff as surety and was given to cover school funds of school district No. 8, in Jefferson county, which were subsequently deposited in the bank. The bank failed and the plaintiff company paid over to the school district $7,951.70, which was its liability obligation under the bond. The above-named individual defendants are designated in the record as indemnitors. Some time after the plaintiff had paid over to the school district the amount of its deposit in the failed bank, this action was brought against the indemnitors upon their agreement of indemnity to recover the amount so paid, with lawful interest thereon from May 7, 1924, and for $650 attorney fees incurred in the prosecution of this action. Defendant Fairchild, *inter alia*, pleaded a general denial, and insists that, under the facts and the law, he should be relieved of liability on the grounds which are hereafter discussed. The individual defendants, above referred to, except Fairchild, did not appeal. The defendant

Fairchild's appeal is based on the judgment which was entered on the verdict of a jury.

Briefly, but with slight repetition, the material facts in respect of the merits follow: The bank was desirous of obtaining deposits in the sum of $15,000 from the treasurer of the school district. To this end the bank obtained the certified depository bond in suit from the bonding company. The latter company, however, was not satisfied with the financial statement which the bank submitted to it, and hence refused to execute the bond except on condition that the bank obtain a special indemnity agreement, to be executed by responsible indemnitors, and delivered to the plaintiff. The bank complied with this requirement. The plaintiff bonding company thereupon executed the above-mentioned indemnity bond. Fairchild, however, did not himself sign the agreement in suit. This is not denied, nor is it denied that Arthur R. Nichols, one of the five defendants, wrote the name of his codefendant Fairchild thereon. Nichols, however, was not authorized in writing, by Fairchild, to sign his name thereto.

Sections 2458 and 2560, Comp. St. 1922, form a part of the statute of frauds. The introductory paragraph to section 2458 and the second paragraph follow:

"In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. * * * Second. Every special promise to answer for the debt, default or misdoings of another person."

Section 2560 reads:

"Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by his agent, thereunto authorized by writing."

Clearly, a statutory proposition of fundamental law cannot be more plainly stated than that contained in the foregoing citations from sections 2458 and 2560 of the statute of frauds.

Whether Nichols was clothed with lawful authority to

perform this office is the outstanding question presented by the record. Nichols testified that Fairchild verbally authorized him to subscribe his name to the indemnity agreement. Fairchild denied that he ever at any time authorized Nichols or any other person to write his name thereon. But the disagreement between Fairchild and Nichols, in respect of Nichols' alleged authority to sign, in view of the facts and the law applicable thereto, does not appear to be important, from the fact that authority to sign was not in writing. So that, even though Nichols was verbally authorized to sign by Fairchild, as Nichols contends, such signing, in view of the material facts and the law, is not binding on Fairchild.

One of the prime objects of the cited sections of the statute of frauds, in modern transactions and practice, is to prevent the introduction of the evidence of witnesses who depend solely upon memory to detail the facts in respect of transactions which are to be established by the introduction of written instruments which are signed by the party to be charged. And it is elementary that the authority of a principal given to an agent to make a single contract, whether in writing, or otherwise, does not confer an implied power upon such agent to make other contracts generally with other persons, even though of the same nature or kind.

In an analogous case, in an opinion by Root, J., we held that the contract of an agent given in the name of his principal for the sale of land is void under the fraud statute unless the agent's authority is in writing. *Ross v. Craven*, 84 Neb. 520; *Riiff v. Riibe*, 68 Neb. 543. "Even when there is express authority for an attorney in fact to bind his principal as surety, it is the policy of the law to construe it strictly and to hold the principal not bound, unless the authority is exercised within the undoubted limits prescribed." *Clinton v. Hibb's Ex'x*, 202 Ky. 304. Speaking generally it may be said that it is elementary that the signing of a bond, by an obligor whose signature was forged, cannot be ratified and does not render him liable thereon. *McHugh v. County of Schuylkill*, 67 Pa. St. 391, 5 Am. Rep.

445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546. The spirit of the fraud statute, having been adopted to prevent fraud, cannot be evaded by mere changes in the language of parties nor by the form under which the transactions are disguised. Browne, Statute of Frauds (5th ed.) 218.

The conclusion is that the judgment of the district court must be and it hereby is reversed and remanded, with directions that the action be dismissed.

REVERSED AND DISMISSED.

HERMAN E. FAIRCHILD, APPELLEE, V. MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLANT.

FILED MAY 28, 1928. No. 25512.

This is a companion case to *Massachusetts Bonding & Ins. Co. v. Nichols*, *ante*, p. 93, and is governed by that case.

APPEAL from the district court for Jefferson county: HARRY D. LANDIS, JUDGE. *Reversed and dismissed.*

Kennedy, Holland, DeLacy & McLaughlin, and *Denney & Denney*, for appellant.

Perry & Van Pelt, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ.

DEAN, J.

This is an independent suit in equity by Herman E. Fairchild for a new trial of the case of Massachusetts Bonding & Insurance Company against Arthur A. Nichols and others, impleaded with Herman E. Fairchild, wherein the district court for Jefferson county entered a judgment against Fairchild and others for $8,502.94. This suit was commenced at a subsequent term of court, and upon a trial of the issues raised by the pleadings herein the judgment in the former case was set aside as to Fairchild and as to

him a new trial was granted. From that judgment the Massachusetts Bonding & Insurance Company appealed.

On direct appeal from the judgment against Fairchild for $8,502.94, it was held that he was not liable therefor. That judgment was reversed, with directions to dismiss the action as to him. *Massachusetts Bonding & Ins. Co. v. Nichols, ante,* p. 93. By direct appeal in that case Fairchild therefore obtained all the relief to which he was entitled. The present suit in equity for a new trial was therefore unnecessary, and for that reason the judgment granting a new trial in the equity suit is reversed and dismissed at the cost of Fairchild in both courts.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, APPELLANT, V. FEDERATED MERCHANTS MUTUAL INSURANCE COMPANY, APPELLEE.

FILED MAY 28, 1928. No. 26260.

1. **Statutes.** It is a general rule that legislative acts will be held to operate prospectively and not retrospectively, unless a contrary intent or purpose is clearly disclosed.
2. **Insurance: STATUTES ACT PROSPECTIVELY.** Section 7816, Comp. St. 1922, as amended by chapter 124, Laws 1925, prescribing the classes of insurance which insurance companies may be formed to transact, construed, and *held* to act prospectively and not retrospectively, and not to limit the classes of insurance which a previously existing, legally organized company was authorized to write.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

O. S. Spillman, Attorney General, and *T. J. McGuire,* for appellant.

Hall, Cline & Williams and *Roy B. Ford, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ., and LANDIS, District Judge.

GOOD, J.

This is an action in *quo warranto*, instituted by the attorney general, in the name of the state, to oust the defendant from exercising in this state powers, which it claims, of writing certain kinds of insurance. To the petition defendant interposed a demurrer, which was sustained. Relator elected to stand upon his petition, and the action was dismissed. Relator has appealed.

In the petition it is alleged that the respondent is a mutual insurance company, organized under and by virtue of the laws of the state in conformity with chapter 45, Laws 1897, and acts amendatory thereto, and that it is engaged in writing the classes of insurance under subdivisions 1, 6, 8, and 12, of section 7814, Comp. St. 1922, as amended by chapter 124, Laws 1925; that, pursuant to the provisions of section 7816, Comp. St. 1922, as amended by said chapter 124, it is unlawful for the respondent to engage in all of the lines of insurance in said several subdivisions.

Said section 7814, as amended, authorizes the formation of insurance companies to transact 14 distinct classes of insurance, each class being especially described in the corresponding number of subdivisions of the section. Section 7816, Comp. St. 1922, as amended by said chapter 124, provides:

"No company shall be formed for the purpose of engaging in any other kinds of insurance than that specified in some one of the subdivisions of section 1 of this article (section 7814, as amended), or more kinds of insurance than are specified in a single subdivision, except that a company may be formed:

"1. For the purpose specified in subdivisions one and twelve; or

"2. For the purposes specified in subdivisions two and three; or

"3. For any or all the purposes specified in subdivisions three to fourteen, both inclusive, except subdivision ten."

It will be observed that there is no combination of classes

of insurance under which an insurance company may be formed for writing insurance specified in subdivisions 1, 6, 8, and 12, and, if this were the statute under which the insurance company was formed or organized, clearly it would not be authorized to transact all the classes of insurance specified in said subdivisions 1, 6, 8 and 12. It might be organized and transact business, under the first paragraph, for the purpose of carrying on the classes of business specified in subdivisions 1 and 12, or, under the third paragraph, for carrying on the classes of business specified in subdivisions 6, 8, and 12. There is no averment in the petition as to when the respondent company was formed, nor what classes of insurance it might lawfully write when organized.

The legislature of 1925 passed another act, known as chapter 126, Laws 1925, which amended section 7816, Comp. St. 1922, and contained an emergency clause by which the act went into effect on March 31, 1925. Section 7816, as by this act amended, in so far as applicable to the case in hand, is as follows:

"No company shall be formed for the purpose of engaging in any other kinds of insurance than that specified in some one of the subdivisions of section 1 of this article (section 7814, Comp. St. 1922), or more kinds of insurance than are specified in a single subdivision, except that a company may be formed:

"1. For the purpose specified in subdivisions one and twelve; or,

"2. For the purposes specified in subdivisions two, three and five; or,

"3. For any or all the purposes specified in subdivisions three to fourteen, both inclusive, except subdivision ten; *or a mutual company may be formed for any or all of the purposes specified in subdivisions one, six, eight and twelve.*" (Italics ours.)

Chapter 126, Laws 1925, was in force from and after March 31, 1925, until, at least, the taking effect of chapter 124, Laws 1925. By the express provisions of the third

paragraph of section 7816, as amended by chapter 126, Laws 1925, mutual insurance companies were authorized to be formed for any or all the purposes specified in subdivisions 1, 6, 8, and 12. It will thus be seen that from and after March 31, 1925, until, at least, the taking effect of chapter 124, Laws 1925, which became effective three months after the adjournment of that session of the legislature, the respondent was authorized to engage in all of the lines of business which, it is averred in the petition, it is writing. The parties to the action argue, and seek to have the court determine, whether chapter 126, Laws 1925, is repugnant to and inconsistent with the provisions of chapter 124, Laws 1925, and, if so, whether chapter 124, which was passed subsequent to chapter 126, operates to repeal chapter 126, in so far as they are in conflict. We do not think it necessary to determine this question, because it is not properly presented by the record before us.

It will be observed that the language of section 7816, Comp. St. 1922, as amended by chapter 124, Laws 1925, does not purport to restrict an *existing* insurance company in the lines of business which it may write, but has reference to companies *formed* under the law. It is a general rule that statutes will act prospectively and not retrospectively, unless a contrary intent or purpose is clearly disclosed. *State v. City of Kearney*, 49 Neb. 337; *McIntosh v. Johnson*, 51 Neb. 33; *Commercial Bank of St. Louis v. Eastern Banking Co.*, 51 Neb. 766; *Sharpe v. Grand Lodge, A. O. U. W.*, 108 Neb. 193. There is nothing in the statute which indicates any intent or purpose that it should operate retrospectively. We must hold, therefore, that it was intended to operate only prospectively. Such being the case, it would not affect the right of an existing insurance company to engage in writing the classes of business which it was, under the previously existing law, authorized to write. As already observed, the law, in existence immediately preceding the time that chapter 124, Laws 1925, became effective, authorized the respondent, being a mutual insurance company, to engage in writing all lines of insur-

ance mentioned and described in subdivisions 1, 6, 8, and 12, of section 7814, Comp. St. 1922. The petition, therefore, fails to show on its face that respondent was engaged in unlawfully writing any line of insurance.

It follows that the demurrer was properly sustained, and the judgment of the district court is therefore

AFFIRMED.

HERBERT H. HOWARD ET AL., APPELLANTS, V. J. H. JENSEN, COUNTY TREASURER, ET AL., APPELLEES.

FILED MAY 28, 1928. No. 26025.

1. **Schools and School Districts:** RURAL HIGH SCHOOL ACT: CONSTRUCTION. The prime effort in construing the rural high school act, sections 6373-6384, Comp. St. 1922, is to determine the legislative intention as disclosed by the provisions of the law and the general object to be accomplished.
2. ———: ———: TAXATION: INTENT OF LEGISLATURE. The intention of the legislature in the provisions of the rural high school act regulating the assessment and levy of taxes was to protect the taxpayer.
3. **Statutes:** CONSTRUCTION. The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the legislature.
4. **Schools and School Districts:** RURAL HIGH SCHOOL ACT: TAXATION. The literal meaning of the word "shall" must be given consideration in determining the legislative intention of sections 6377, 6382, Comp. St. 1922, regulating the assessment and levy of a rural high school tax.
5. **Statutes:** TAXATION: MANDATORY PROVISIONS. Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer.
6. ———: ———: ———. Statutory provisions for the levy of a tax are imperative.
7. **Taxation:** RURAL HIGH SCHOOLS. Compliance with the provisions of section 6382, Comp. St. 1922, requiring the trustees to present an estimate for adoption to the electors at an annual meeting on the first Monday of June is a condition precedent to the levy of a rural high school tax.
8. ———: ———. A rural high school district annual tax levy, based upon an estimate adopted by school electors at a meeting

on the second Monday instead of on the first Monday of June, as required by section 6377, Comp. St. 1922, *held* void.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed, with directions.*

Lewis C. Paulson, for appellants.

C. P. Anderbery and *J. L. McPheely, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and LANDIS, District Judge.

LANDIS, District Judge.

This is an action wherein certain resident taxpayers of school district No. 67, of Kearney county, Nebraska, seek to enjoin the county treasurer from collecting the 1926 annual tax levy for the Lowell rural high school district, composed of two country grade school districts Nos. 67 and 2. The trial court dismissed plaintiffs' action, and they appeal.

The expenses of maintaining rural high schools are borne by the districts united for that purpose in proportion to their assessed valuation. The trustees prior to the annual meeting prepare an estimate of the sums necessary for maintenance for the coming year. This estimate is presented for adoption to the electors at the annual school meeting. The trustees certify to the county clerk and county superintendent the estimate adopted at the annual meeting, thereupon the board of county commissioners make the levy. Comp. St. 1922, sec. 6382.

Section 6377, Comp. St. 1922, provides: "The annual school meeting of each rural high school district shall be held at the schoolhouse, if there be none at some other suitable place within the rural high school district, on the first Monday of June of each year."

The appellants' complaint against the tax levy is that it is not based upon an estimate adopted by the school electors in an annual meeting as provided for in section 6377,

supra. The tax is based upon an estimate adopted at a meeting of the electors on the *second* Monday of June, 1926.

This appeal presents only one question, namely, what is the effect on the instant tax levy of the failure of the Lowell rural high school district to hold its annual school meeting on the first Monday of June, 1926? In the determination of this question the prime effort is to ascertain the legislative intention as disclosed by the provisions of the law and the general object intended to be accomplished. The rural high school act, sections 6373-6384, Comp. St. 1922, has as part of its general object an enforced contribution of money based on the assessed valuation of property within the district for the purpose of maintaining a school of more than eight grades. Among the protecting conditions precedent to the enforced contribution or tax are: (a) "The trustees shall, prior to the annual meeting herein provided, prepare an estimate of the sums required for the maintenance of the high school during the coming year and present such estimate for adoption to the electors at such annual meeting." Comp. St. 1922, sec. 6382. An annual meeting set on a definite date in terms "shall be held on the first Monday of June of each year." Comp. St. 1922, sec. 6377.

Appellees contend that section 6377 directs the holding of the annual meeting at a certain time, without negative words restraining the holding of it afterwards, hence this provision as to time should be held directory, and not a limitation of authority. The obvious intention of the legislature gathered from the provisions of the act was to protect the taxpayer. Definite regulatory provisions to base the assessment and levy of the tax are set out. Certain steps, the very essence of which are proceedings for the benefit and protection of the taxpayer, must be taken before the enforced contribution for support of the school is available.

The electors of school district No. 67 are required to hold their annual meeting on the second Monday in June of each year. In the instant case the rural high school district,

of which school district No. 67 is a part, held its annual meeting also on the second Monday of June, in school district No. 2. It might easily occur that thereby electors of district No. 67 would be prevented from attending this rural high school meeting. Under the circumstances it is fair to say that electors of district No. 67 would have to decide whether to attend their annual meeting or the rural high school district meeting when it is their legal privilege to attend both. The consequences that would result from construing the provisions of a statute should be taken into consideration in determining the intention of the legislature.

It is to be noted in considering the particular language used in sections 6377 and 6382 that the imperative word "shall" is used, and not the permissive word "may," whenever reference is made to the annual meeting. Standing alone, the literal meaning of "shall" might not have weight; but, in determining the intention of the legislature as to what is necessary upon which to base the assessment and levy of a tax, some consideration must be given to the generally accepted meaning of the word.

In *State v. Cones,* 15 Neb. 444, a *quo warranto* action, is announced the syllabus: "The annual school meeting of each school district for the election of officers is required to be held on the first Monday of April of each year, and there is no authority to adjourn the election to another day." In this case the election of a school treasurer at an adjourned meeting was held a nullity.

State v. Talich, 112 Neb. 723, also a *quo warranto* action, reannounces the quoted syllabus of *State v. Cones, supra.* Here, a moderator was elected at the annual meeting, but resigned at an adjourned meeting, where his successor was elected, and it was held that this could not be done because the electors at the adjourned meeting had no authority to elect officers or to accept a resignation.

The case of *Ryan v. Stumpenhorst,* 114 Neb. 69, announces the syllabus: "An act of the legislature of 1923, Laws 1923, ch. 1, providing in substance for farm bureaus,

construed, and *held* that the provision for filing a remonstrance within 20 days after the filing of the petition is mandatory, and the remonstrance filed 38 days after the filing of the petition, and the election had thereunder, are each void. In such case, mandamus will lie to compel the county board to proceed as if no remonstrance had been filed or election had." In the construction of this statute the use of "shall set aside" and "shall submit the question to a vote" were held to be imperative directions as to the time when and within which an act, such as filing a petition and remonstrance, must take place.

Acts required by a statute to make a tax chargeable are conditions precedent, and must be strictly complied with. *Hewes v. Reis*, 40 Cal. 255. "Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer." 1 Desty, Taxation, p. 515. In tax laws, provisions for the levy of a tax are imperative. 1 Cooley, Taxation (4th Ed.) sec. 124; *Jones v. State*, 17 Fla. 411; *People v. Otsego County*, 51 N. Y. 401; *City of Indianapolis v. McAvoy*, 86 Ind. 587.

When the legislative intent as disclosed from the provisions of the act, the general object intended to be accomplished, the particular imperative directions are all considered, then we must hold that section 6377 definitely fixes a time when and within which the electors must approve the estimate to base the tax. It is one which must be obeyed according to the substantial import of its terms under sanction of having the proceeding adjudged void. There is a limitation of authority and power imperatively declared by the section. The previous decisions of this court herein cited by analogy confirm this construction. Section 6377 is for the benefit and protection of the taxpayer and should be mandatory. Suppose the school electors arbitrarily refuse to approve the estimate at the annual meeting on the first Monday. Then the legislature has provided protection for the school under section 6289, Comp. St. 1922, which makes it the duty of the county

superintendent to make the estimate, and the county clerk to make the levy.

Every thinking citizen is proud of the educational consciousness of our state, but it should be remembered that the continuance of such depends upon a satisfied taxpayer. Fifty-one and six-tenths cents of the average 1927 tax dollar was used to support public schools and state educational institutions. Report Tax Commissioner, 1927. The taxpayer is entitled on principle to mandatory construction as to every basic step in the levy and assessment of this enforced contribution. Where the legislature has declared imperative safeguards for the protection of the taxpayer, they should be strictly construed so certainty in their exercise shall obtain. To do otherwise would seriously harm education. The 1926 tax levy at issue is void. The judgment of the trial court dismissing plaintiffs' action is reversed, and the cause remanded, with directions to enter decree granting the relief prayed for in the petition.

REVERSED.

Rose, Dean and Howell, JJ., dissent.

IN RE JAMES CARBINO.
SARAHA FANCUILIO, APPELLANT, V. WILLIAM T. FENTON, APPELLEE.

FILED JUNE 1, 1928. No. 25909.

1. **Habeas Corpus.** It is a general rule that habeas corpus will not lie to discharge from custody one serving a penal sentence, if the court imposing such sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose.
2. ———. "The writ of habeas corpus cannot be used as a substitute for proceedings in error." *Hulbert v. Fenton*, 115 Neb. 818.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

North & O'Reilly, for appellant.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

This is a proceeding in habeas corpus on behalf of James Carbino against the warden of the state penitentiary, to determine whether Carbino is unlawfully restrained of his liberty by the respondent. An appeal has been prosecuted from a judgment denying the writ and dismissing the proceeding.

From the petition and the return of the respondent, it appears that Carbino was convicted of murder in the first degree in the district court for Douglas county, and sentenced to imprisonment in the state penitentiary for the term of his natural life. The demand for the relief is grounded upon the contentions that Carbino, at the time of the commission of the offense charged and for a long time prior thereto and ever since, was and has been insane; that because of his insane condition he was incapable of committing any offense, and by reason thereof he was incapable of presenting and did not present the defense of insanity in his trial for murder; that therefore the judgment of the district court is void, and that defendant is unlawfully deprived of his liberty.

In this jurisdiction insanity is recognized as a defense in a criminal action, if it appears that at the time of the commission of the offense the defendant does not know right from wrong with respect to the particular act. If, as contended, Carbino was, at the time of the commission of the offense, insane, that was a matter which could and should have been presented in his defense on his trial for murder. Incidentally, it may be remarked that Carbino was represented in his trial by counsel, and no complaint is made that he was not properly represented by them. It is at least strange that neither the court, nor the jury, nor

any of Carbino's relatives, nor his counsel would discover the fact, if Carbino was so insane as not to be legally responsible for his action. The record in the instant case indicates that Carbino was not insane. We deem it unnecessary, however, to determine the question of whether or not he was, in fact, insane.

It is a general rule that habeas corpus will not lie to discharge one from a sentence of penal servitude, if the court imposing the sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the power of the court to impose. In such case, the judgment is not void.

In *Hulbert v. Fenton,* 115 Neb. 818, it was held: "The writ of habeas corpus cannot be used as a substitute for proceedings in error." In *Michaelson v. Beemer,* 72 Neb. 761, this court held: "To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity." And in the *Hulbert* case it was further held: "Where the trial court has jurisdiction of the offense and of the person of the defendant and has power to render the particular judgment or sentence in a proper case, habeas corpus will not lie upon the ground of mere irregularities in the judgment or sentence." Similar holdings have been made by this court in *In re Fanton,* 55 Neb. 703, and in *McElhaney v. Fenton,* 115 Neb. 299.

The record clearly discloses that the district court for Douglas county had jurisdiction of the person of Carbino and had jurisdiction of the offense, and that the sentence imposed was within the power of the court under the statutes.

The record appears to be free from prejudicial error, and the judgment is

AFFIRMED.

HOWELLS STATE BANK OF HOWELLS, APPELLEE, V. HANS E. ARPS, SHERIFF, APPELLANT: F. W. BOLAND, APPELLEE.

FILED JUNE 1, 1928. No. 26127.

1. **Exemptions.** Section 9039, Comp. St. 1922, construed, and *held*, that only those persons who are residents of the state of Nebraska and heads of families are entitled to the exemptions provided by the eighth subdivision thereof.
2. **Overruled Cases.** The second paragraph of the syllabus in *Roberts v. Moudy*, 30 Neb. 683, is overruled; and the opinion in *Shreck v. Gilbert*, 52 Neb. 813, in so far as it appears to exempt to a resident attorney, not the head of a family, his library, is disapproved.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

George W. Wertz, for appellant.

W. M. Cain, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

GOOD, J.

This is an action in replevin. Plaintiff had judgment and defendant appeals.

Plaintiff claimed right to the possession of the chattels by virtue of a chattel mortgage. Defendant Boland was the owner of the chattels. Defendant Arps was the sheriff and, under an attachment issued in an action against Boland, had levied on and taken possession of the chattels and had them in his possession at the time this action was begun. The chattel mortgage was executed and given to plaintiff subsequent to the levy of the attachment. Boland was a physician, a single man and not the head of a family. He occupied a building in Howells as his office and residence in which he had his surgical instruments and appliances, medicine cabinet, office furniture, fixtures and household goods, which are the chattels involved in this action.

A single question is presented for determination: Were the chattels exempt to the defendant Boland? If they were exempt, then the levy of the attachment was wrongful, no lien was acquired thereby, and plaintiff would be entitled to possession. On the other hand, if the chattels were not exempt to Boland, then the sheriff, by virtue of his levy of the attachment, acquired a lien thereon and is entitled to possession.

The decision in this action rests on a proper construction of section 9039, Comp. St. 1922. In so far as applicable, section 9039 provides: "No property hereinafter mentioned shall be liable to attachment, execution or sale on any final process issued from any court in this state, against any person being a resident of this state and the head of a family." Then follow eight subdivisions, each describing a class of chattels that are exempt. We are concerned only with the last subdivision, which is as follows:

"Eighth. The tools and instruments of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business; the library and implements of any professional man.

"All of which articles hereinbefore intended to be exempt, shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be."

It is argued on behalf of plaintiff that the above quoted provision exempts to a professional man his library and implements, whether he is the head of a family or not. Stress is placed on the word "any" in the clause, "the library and implements of any professional man," and it is contended that the word "any" in this clause exempts to every professional man his library and implements. Plaintiff cites and relies on the cases of *Roberts v. Moudy*, 30 Neb. 683, and *Shreck v. Gilbert*, 52 Neb. 813, to support its contention.

In *Roberts v. Moudy, supra*, the second paragraph of the syllabus is as follows: "The library and implements of a professional man, a resident of the state, are exempt under section 530 of the Code (section 9039, Comp. St. 1922),

whether he is the head of a family or not." This language certainly tends to support plaintiff's theory. The first paragraph of the syllabus in that case, however, discloses, and it was therein held, that the debtor was a resident of the state, the head of a family, and entitled to the benefit of the exemption law. Such being the case, it was clearly unnecessary for the court to go farther and determine whether or not one, who was not the head of a family, was entitled to the exemption claimed. Since it was unnecessary to a determination of the case, the rule announced must be regarded as mere dictum.

In the case of *Shreck v. Gilbert, supra,* the third paragraph of the syllabus is as follows: "The library of an attorney at law, a resident of the state, is exempt under section 530 of the Code of Civil Procedure (section 9039, Comp St. 1922)." While the opinion does not disclose whether the debtor in that case was the head of a family, resort to the record does show that the debtor was a resident of the state and the head of a family, so that, as applied to the facts as they existed in that case, the holding in *Shreck v. Gilbert, supra,* was proper, but the statement of law, standing alone, is misleading. It was unnecessary in the *Shreck* case to determine whether one, who was not the head of a family, was entitled to the exemption.

We think that a careful analysis of the statute makes it quite clear that the exemption must depend upon the first paragraph of section 9039 *supra,* and the exemption therein allowed is to "any person being a resident of this state and the head of a family." The argument that the eighth subdivision, standing alone, grants an exemption to any professional man is not sound. By examining the eighth subdivision, it is apparent that no exemption is therein provided. It merely describes a list or class of property, but, to determine that there is any exemption and who is entitled thereto, resort must be had to the first paragraph of the section above quoted. The first paragraph of the section must be read in connection with, and as though it

formed a part of, each of the separate subdivisions or classifications of property mentioned in that section.

The rule announced in the second paragraph of the syllabus in *Roberts v. Moudy, supra,* is not the law and is overruled. The opinion in *Shreck v. Gilbert, supra,* in so far as it appears to be in conflict with this opinion, is also overruled. Apparently, the learned trial judge rendering the decision in the instant case did not feel at liberty to disregard, but followed, the rule erroneously announced in *Roberts v. Moudy, supra.*

It follows that the judgment of the district court is erroneous and is reversed, and the cause remanded, with directions to enter judgment for the defendant.

REVERSED.

IRVIN R. MOREARTY, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

FILED JUNE 1, 1928. No. 25952.

1. **Municipal Corporations:** CONTRACTS. Where a contract in written form is signed by a paving engineer who is to perform services in the construction of street paving for a city of the second class, of more than 1,000 and less than 5,000 inhabitants, which is delivered to such city, and, later, during the performance of the services, the city council directs the mayor to execute the contract, and the same is executed and a copy given to the engineer, who subsequently continues the work to completion, the contract becomes binding and its execution relates back to the first signing thereof by the engineer.
2. ———: ———: RECOVERY. Under such a contract as stated, if the engineer substantially performs the services required of him by its terms, he may recover from the city the compensation therein stated, in a suit thereon, and is not required to resort to an action *quantum meruit.*
3. ———: ———: ———: RECOUPMENT. In an action on such contract, the city may recoup damages, if any, which it suffered by reason of a failure to strictly perform the contract.
4. ———: ———: ———. The undisputed evidence shows that the contract in suit was performed by the appellant in all respects except that he failed to make the final estimates required,

and failed to make a valuation of the property benefited by the paving, and to assess the cost back against such property. *Held*, notwithstanding such failures, the appellant substantially performed the contract as required of him, and is entitled to recover the contract price for his services, less the reasonable and necessary expenses and damages, if any, which the city incurred and suffered, in completing said contract, as to the omissions stated.

5. ———: ———: RATIFICATION. A city may ratify a contract irregularly made in its behalf if it possessed power to make the contract in the first place.

APPEAL from the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Bernard McNeny, and *C. D. Ritchie*, for appellant.

Perry & Van Pelt, John F. Cordeal, and *L. H. Cheney, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., and REDICK and WHEELER, District Judges.

HOWELL, J.

This is an appeal by plaintiff, also appellant, from a judgment against him rendered at the close of his testimony, on the motion of appellee, also defendant, dismissing plaintiff's petition and cause of action.

It is expedient to fix in mind the precise issues involved. Plaintiff's petition alleged: The plaintiff was employed as "consulting engineer" to assist in constructing all pavements and sewers in McCook to be let within one year from June 27, 1925. On that date plaintiff signed a written contract relating to that work, and delivered it to the defendant. About April 9, 1926, defendant signed that contract and delivered a copy to the plaintiff. During the year defendant contracted paving as follows: October 12, 1925, First street job for $126,301.03; January 18, 1926, Second street job for $210,007.64; and March 29, 1926, Third

street job for $197,429.55. Plaintiff performed the work required of him under the terms of the contract as to plans, specifications, estimates, supervision and inspection, and defendant received, accepted and retained the benefits thereof. The October, 1925, contract was completed and accepted July 12, 1926; the January 18, 1926, contract was completed and accepted August 12, 1926; the March 29, 1926, contract was completed and accepted October 11, 1926, by reason of which there was due plaintiff $26,686.86, less payments made to him by the city on November 23, 1925, $867.26, December 28, 1925, $1,910.50, and March 8, 1926, $800. Plaintiff prayed judgment for $23,109.10, interest and costs.

Defendant answered, admitting its incorporation, and denying all other allegations in the petition, and affirmatively alleged: About April 13, 1925, plaintiff accepted an appointment as its city engineer at a salary of $4 a day, for time engaged, but not to exceed $300 per annum. He took the oath of office and continued to be and act as city engineer until April 13, 1926. During all of that year defendant "was entitled to the time, *skill and services of plaintiff* at the salary so agreed upon, and that the *pretended contract and agreement, set forth in plaintiff's petition,* was and is *against public policy and void.*" Plaintiff was estopped because he disregarded his duties as "such city engineer," by improper advertisements for bids, improper blue prints, divulging information to preferred bidders, preventing competition, unskilful inspection, not requiring skilful work, permitting inferior material, allowing poor labor, causing acceptances of defective work and inferior quality of workmanship. Defendant prayed a dismissal of plaintiff's action, and for costs.

Plaintiff replied by general denial, and alleged that the work done by him was not such as would be performed by an ordinary city engineer; that he expended $14,369.56, in the performance of his contract, for other engineers, inspectors, surveyors and foremen, with the knowledge of defendant; that defendant adopted all plans and had re-

ceived his services and the services of those employed by him, with full knowledge of the details thereof; that the city council employed plaintiff as a "special engineer" to perform the work mentioned in plaintiff's amended petition, and that his compensation for said work was fixed by the defendant at the time of his employment to do said work.

The effect of the foregoing is admission of the contract and avoidance thereof, because plaintiff was city engineer on a salary of $4 a day, not to exceed $300 per annum. The city was entitled to his services as city engineer at the salary named, and "the pretended contract and agreement" was "against public policy and void."

The attempted plea of estoppel defeats itself since it presents conclusions amounting to nothing more than a mere breach of contract. The answer, in effect, admits plaintiff performed work contemplated in the written contract, in that it alleges, in general terms, wherein the performance of his duties were not efficiently complied with. So, in reasoning finally, it can be said the only issues before this court are: (1) Was the contract valid in law? (2) Did the plaintiff substantially perform the services required of him? (3) What sum, if any, is due from the defendant to the plaintiff under the provisions of the contract?

We have examined the record with care and are convinced that plaintiff never was the "city engineer" of the city of McCook on a salary. He performed all the work required of him by the written contract, except making the final estimates and assessments of the cost on benefited properties, which could have been done by him in six to eight days. Such failure affords a foundation for damages easily calculated, and the plaintiff should be paid the contract price for his services, less what was paid him by the city, plus the expenses of making final estimates and assessments. So far as the pavement is concerned, plaintiff fully performed his work, and the pavement was approved by the city and accepted.

The trial court, as shown by the bill of exceptions, stated its reasons for rendering judgment against the plaintiff. Among other things, it was said: "I am satisfied * * * that he (plaintiff) did not accept and never was the city engineer. * * * There is no question but that he did some work, beginning in May or June, 1925." Plaintiff did not complete the work. "He made no valuation of the work done for assessment against the property." We add, he did not make the final estimates for work done by the contractors. "He has founded his case upon a contract. * * * One of the first exhibits was the minutes of the proceedings of the council under date of April 9 (1926). The wording of the resolution * * * was that the mayor be authorized and instructed to sign the contract with the plaintiff * * * indicating by the very wording of it * * * that the mayor was never authorized to enter into any contract * * * prior to that time. * * * The contract became effective as the contract of April 9, 1926; prior to that it was a mere proposition." "He says that he entered into the contract and signed it himself, * * * and (it) was thereafter signed and executed by the defendant. * * * Now, there comes the question of departure and variance. * * * If work was performed prior to that time, and some of it was performed, it was performed without any agreement as to compensation. * * * Now, if he performed without any contract, * * * then, he cannot recover upon this contract at all, but must recover upon *quantum meruit*." We have quoted thus extensively from the statements of the trial court, because it shows the precise question to be decided.

The evidence discloses, without conflict, that, on June 27, 1925, pursuant to prior negotiations, plaintiff signed the written contract in suit, which fixed his compensation and required him to give a $10,000 bond to the city, which recites: "Whereas, said principal has been employed by the city of McCook, Nebraska, as consulting engineer, covering certain paving work, in accordance with this proposal," conditioned that plaintiff shall "comply with all the terms, covenants and conditions of said contract," etc. The bond

was filed with the city authorities and accepted. Subsequent to that time, plans and specifications, blue prints and instructions to bidders were prepared by plaintiff and accepted and used by the city. Later, other and similar plans, etc., were prepared on two additional paving contracts. Those documents cover more than 120 legal size pages of single spaced typewriting. They were all accepted. They related to work aggregating $533,738.22. The three paving jobs were accepted by the city, one on July 12, 1926, and one on August 12, 1926, and one on October 11, 1926.

Plaintiff testified he prepared the plans and specifications, made surveys, set stakes and inspected and supervised all of the paving done. He had four inspectors, two of whom he paid $200 a month, and two $125 and $100, respectively. He also employed the Omaha Testing Laboratories and paid them 3 per cent. per square yard for 150,000 square yards of pavement. He remained at work until in October, 1926—"put in all of my time after June 27, 1925." The mayor testified that all of the city officers knew Morearty was on the job, and that the compensation he was to receive was talked over among them. A city councilman testified that Morearty was doing the engineering work when the contracts for paving were let, drew up the plans and specifications, and looked after the work, having inspectors and chemists employed.

A few days after the mayor signed the contract on April 9, 1926, a new council came into office. While it did not discharge plaintiff, it "just left him alone."

Defendant offered no proof. So far as the record shows, it is barren of any neglect of duty, misconduct or dishonesty on plaintiff's part; nor does it disclose any damage to defendant. There was no fraud in the signing of the contract by the mayor on April 9, 1926. It is fair to assume, from all the facts and circumstances, that a failure to sign the contract at an earlier date was the result of inadvertence or carelessness. If, in truth, the council had orally or tacitly agreed to pay for the services of plaintiff according to the contract terms, it was good morals for the

mayor to sign when he did. The city had received his services and the benefit of large expenditures. Before a party to a contract can deprive another of its benefits, he must plead and prove something more than appears in this case. The record does not even suggest healthy suspicion. Much is said in appellee's brief about the council meeting of April 9, 1926, being a special meeting and illegal.

On April 12, 1926, there was a regular meeting, the minutes of which show that the minutes of the meeting of "April 9 was read and approved." The minutes of October 12, 1925, show the allowance of a bill to plaintiff of $925. It also shows an acceptance of a paving bid for a part of District No. 8, "in accordance with the plans and specifications of I. R. Morearty, city engineer, on file." Another resolution was passed at that meeting, providing for the paving of other parts of District No. 8 "in accordance with plans," etc., "prepared by I. R. Morearty * * * now on file."

July 12, 1926, minutes approved and accepted paving in District No. 8 under the October 12, 1925, contract as "fully completed according to the terms of the plans and specifications" made by plaintiff.

Minutes of January 18, 1926, show contract for paving "in accordance with the plans," etc., "of I. R. Morearty." At the same meeting, it was resolved to pave a part of District No. 8 "in accordance with the plans," etc., "prepared by I. R. Morearty."

Similar minutes appear for March 29, 1926. There are many references, in the minutes, to I. R. Morearty, city engineer.

As to the law, we have little difficulty. It is contended by appellee that complete performance of a contract is a condition precedent to a recovery thereon. The authorities cited do not so hold. Substantial performance is all that is required.

The cases cited by appellee are sound law where applicable. No one will question that one who takes office must perform all official duties for the compensation fixed by

law. Morearty was not an officer; nor is it doubted that persons contracting with cities are bound to know the limitations of the power of the city to contract. Nowhere is it claimed in the briefs that the city of McCook had no *power* to contract. The question is: Did it contract? We think it did. Indeed, there was no issue presented as to the execution or validity of the contract except the allegation in the answer that it was void as against public policy, solely upon the ground that Morearty was an officer of the city and owed all his time and skill to the city for $300 per annum.

In *Standard Bridge Co. v. Kearney County,* 95 Neb. 455, it is held that a county may ratify any contract it has the power to make in the first place. The contract was written out in full and signed by Morearty on June 27, 1925. Its terms were never changed. It was delivered to and retained by the city. The bond for $10,000 was executed and accepted. The work was performed under its provisions. The amount Morearty was to be paid for his services was definite. The city made payments from time to time. No one was deceived. Section 4169, Comp. St. 1922, does not require the compensation of employees to be in writing; it may be fixed "at the time" of employment. Section 4180, Comp. St. 1922, provides for employing a "special engineer" for "improvement of streets," which it may "deem expedient."

In *MacLeod v. City of Washburn,* 178 Wis. 379, it appears that an attorney was employed. The city council "took no action looking toward the employment." The council had knowledge of his employment and acquiesced therein by passing a resolution "discontinuing plaintiff's service on behalf of the city." The court held: "A municipal corporation may ratify the unauthorized acts and contracts of its agents which are within the scope of its corporate powers, and such ratification is equivalent to previous authority"—quoting from *Koch v. City of Milwaukee,* 89 Wis. 220, 228.

On the question of substantial compliance with the contract, it was held in *Library Board v. Ohlsen*, 110 Neb. 146, that, where a contract for a building has been substantially performed, and "the building was accepted," the measure of damages to the accepter "would be the cost of remedying the defects." See, also, *Craig v. Weitner*, 33 Neb. 484.

For the reasons stated, the judgment of the trial court is vacated and the cause remanded, with permission to defendant, city of McCook, to amend its answer setting up its damages, if any, occasioned by the failure of appellant, the plaintiff below, to make the final estimates and assessments of the cost of the paving in question, if it so desires. Costs will be taxed to appellee.

REVERSED.

NORTHWEST READY ROOFING COMPANY, APPELLEE, V. CHRIS F. ANTES, APPELLANT.

FILED JUNE 1, 1928. No. 26003.

1. **Trade-Names: INJUNCTION.** As to the right to injunctive relief to protect a business name, this case is ruled by *Basket Stores v. Allen*, 99 Neb. 217; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426; *Consolidated Fuel Co. v. Brooks*, 91 Neb. 421; and *Carter Transfer & Storage Co. v. Carter*, 106 Neb. 531.
2. **Equity.** The doctrine that a plaintiff who comes into a court of equity with unclean hands will be denied relief has no application, unless his wrongdoing has some proximate relation to the subject-matter sought to be litigated.
3. **Trade-Names: INJUNCTION: LACHES.** Mere laches is no defense to a suit in equity to enjoin a continuing wrongful and fraudulent use of a trade-name.
4. **Corporations: TRADE-NAMES: INJUNCTION: DEFENSES.** It is not a defense to a suit to enjoin the wrongful and fraudulent use of a trade-name, that the defendant is using such name in his business in this state, and the plaintiff is a foreign corporation, doing business from a regular place of business in Nebraska, without having complied with the state statutes relating to foreign corporations.
5. ———: **FOREIGN CORPORATIONS: NONCOMPLIANCE WITH STATUTE.** The state of Nebraska, having prescribed certain con-

ditions upon which foreign corporations may do business in the state, prescribing certain monetary penalties for violation thereof, the state only can complain of a failure to conform to its statutory requirements, and the prescribed penalties are exclusive in so far as third persons are concerned.

6. Technicalities are not favorites of law or equity. Courts relish them as instruments to prevent injustice, but not to defeat justice.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson, for appellant.

Crossman, Munger & Barton and *Woods, Woods & Aitken, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

HOWELL, J.

Appellant, defendant below, comes by appeal to this court from a decree enjoining him from using the appellee's name, or any similitude, in his business. The petition shows that, in 1915, there was an Illinois copartnership in appellee's name, composed of E. D. and W. F. Schuth. They operated a branch in Lincoln, Nebraska, until in June, 1916, when they incorporated in Illinois and were taken over entirely by the corporation—name, debts, assets and business. In 1917 the Lincoln branch was moved to Omaha, maintaining, however, salesmen in Lincoln. In March, 1920, the appellee was incorporated in Nebraska for the purpose of taking over—and did—the Illinois corporation's business in this state, and has ever since conducted the business from Omaha. During the whole embraced period of time, the business was of the same character, still is, and will so continue to be. Prior to and during 1915 appellant was a salesman in Chicago for the copartnership. When the Lincoln branch opened, he was transferred to it and assisted in conducting the business

until in 1917, when the Lincoln branch was transferred to Omaha. Appellant remained with the Illinois corporation as its salesman and collector, under the supervision of the Omaha branch, for 18 months.

In 1918 appellant launched an individual business, of the same character, in Lincoln, under the name of "Northwest Ready Roofing Company," and has continued therein until the filing of the petition in this action, under that or similar deceptive analogues, changing them from time to time. He was doing business of the same kind, using the same methods, plans, materials, manner of advertising, and soliciting business in the same territory, with the same customers as appellee, in and from the same offices or place of business formerly occupied by appellee or its predecessors. There were other allegations, such as requests to appellant to cease his objectionable methods, confusion of names and business, publishing the name of appellee in telephone books and otherwise, etc., for his own benefit.

The answer admitted everything alleged in the petition, from 1915 to 1917 and prior thereto, that, since then, he has been doing the same kind of business as appellee and, in some instances, used a similar flag as that used by appellee for advertisement, and used the same name. Otherwise, the answer was a general denial, with affirmative allegations that the Illinois corporation never complied with the laws of Nebraska relating to doing business by foreign corporations; was an outlaw, pirate and evader of the statutes, and appellee was guilty of laches.

The proofs are conclusive that appellant's conduct cannot be defended or tolerated in the business world by the courts. In that phase, this case is ruled by *Basket Stores v. Allen*, 99 Neb. 217; *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426; *Consolidated Fuel Co. v. Brooks*, 91 Neb. 421; and *Carter Transfer & Storage Co. v. Carter*, 106 Neb. 531. This leaves the questions of laches and "piracy" to be considered.

This is not an action for damages, but one for injunctive relief that apprehends appellee's future business field. The

failure of a foreign corporation which comes into the state with property, fixes itself a home, pays taxes, submits itself to immediate and personal service of process, operated by domiciled management, and otherwise subjects itself to the laws of the state, to strictly comply with the statutes, does not so shock the conscience of the chancellor as to make it a prey to all evilly disposed persons. The state alone possesses power to correct such wrongs as offend against sovereignty alone. We do not have before us a case of balancing wrongs or comparing things *malum in se*. We have held that an unlicensed automobile is not an outlaw to be denied the protection of law. *Pratt v. Western Bridge & Construction Co.*, 116 Neb. 553. The appellee has at no time been a nuisance, trespasser, or outlaw. Section 682, Comp. St. 1922, provides that "each foreign corporation * * * owning or using a part or all of its capital or plant in this state * * * shall make a report in writing" within a time fixed. Sections 683 and 684 require what the report shall contain, and payment of an annual fee. Section 691 provides a money penalty for failure to report, while section 694 allows a remission thereof in the discretion of the "governor, secretary of state and attorney general." None of the sections mentioned prohibit corporations in appellee's class from doing business in Nebraska. If sections 634 and 639 do, they carry the penalty.

The following cases seem to settle the point that the state only can complain that a corporation has not complied with its laws: *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64; *Wright v. Lee*, 2 S. Dak. 596; *Fritts v. Palmer*, 132 U. S. 282; *Fortier v. New Orleans Bank*, 112 U. S. 439; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405. Cases holding that an assignee of good-will may use the old name, *United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York*, 181 Fed. 182; that no state policy is violated, *Booth & Co. v. Weigand*, 30 Utah, 135; *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 138; *Wright v. Lee*, 2 S. Dak. 596; *Kraft v. Hoppe*, 152 Minn. 143; that a statutory penalty is exclu-

sive, *Fritts v. Palmer*, 132 U. S. 282; *David Lupton's Sons Co. v. Automobile Club*, 225 U. S. 489; *Kraft v. Hoppe*, 152 Minn. 143—may be multiplied.

Laches is not a defense to an equity suit to enjoin a fraudulent imitator of another's business or trade name from persisting in the wrong. *Zweck v. Aberdeen Laundry & Dry Cleaning Co.*, 44 S. Dak. 176; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271; 38 Cyc. 881. Laches, estoppel and limitations have some elements in common. Laches may be invoked prior to the running of the statute of limitations, but only upon equitable terms. It is not available to the appellant. His invasion of appellee's rights was deliberate, persistent, continuing, resourceful and, at times, elusive. We agree with every proposition of law stated in appellant's brief relating to equity rules—"unclean hands," *pari delicto*, and "piracy"—but fail to appreciate their application to the facts before us. Some of appellant's contentions are distinctly technical and are not accepted. A technicality should be temperately resorted to at all times, but not to defeat plain justice. Like every known rule of law, it may be liberally applied to oppose, not aid, a manifest wrong.

Every allegation, and more, contained in appellee's petition is sustained by the proofs, the most damaging having come from the appellant, himself.

The decree of the trial court is the only one that could be properly made, and it is

AFFIRMED.

CLAUDE COPLEY FLANSBURG, APPELLANT, V. NETTIE SHUMWAY, EXECUTRIX, APPELLANT: FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED JUNE 1, 1928. No. 26333.

1. **Mortgages**: STATUTORY PROVISIONS. Statutory provisions in force at the time of the execution of a mortgage enter into and become part of the contract.
2. **Waters**: IRRIGATION DISTRICTS. Irrigation districts are quasi-

public corporations, in the sense that they are organized for general public good, with power to assess property within their boundaries for the purpose of raising revenue to secure water to irrigate arid lands.

3. ———: ———: ASSESSMENTS: PRIORITY. Irrigation district assessments are taxes, within the meaning of section 17, ch. 73, Laws 1903, and section 5825, Comp. St. 1922, making general taxes a first lien on real estate, and take priority over an existing mortgage lien.

4. Mortgages: FORECLOSURE: STIPULATIONS. The parties to a mortgage foreclosure suit, wherein certain irrigation district assessments were given priority over the mortgage lien, could not challenge the right and power of the district to levy assessments after having stipulated that the organization of the district was legal and the levy and assessment were duly made.

5. Taxation: LIEN. The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute.

6. Waters: IRRIGATION DISTRICTS: TAXES: LIEN: PRIORITY. Where a county treasurer executed, in favor of an irrigation district, a tax sale certificate and receipts for subsequent taxes, but did not deliver them to the district, and no actual payment was made, the tax liens were not destroyed by the expiration of the statutory period for enforcing the liens under the certificate, and retained their right to priority over an earlier mortgage lien.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

C. C. Flansburg and *B. M. Shumway,* for appellants.

Raymond & Fitzgerald, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and HOWELL, JJ., and LANDIS and REDICK, District Judges.

LANDIS, District Judge.

Appellant here, plaintiff below, obtained a decree of foreclosure. There is no controversy over plaintiff's mortgage, the amount, or that it was due. Certain taxes were given priority over the mortgage lien. Plaintiff's appeal raises the questions of the existence of the taxes, priority

of taxes, if existing, over contract lien, and effect of a tax sale certificate.

Defendant mortgagor, Nettie Shumway, files a separate appeal naming herself as coappellant, wherein she consents to the foreclosure of plaintiff's mortgage, but insists that the apparent lien of the taxes is of no force and effect because of the failure to enforce a tax sale certificate. The cause was heard upon an agreed statement of facts.

In 1910 a mortgage was executed on a parcel of land in an irrigation district, which was duly assigned to plaintiff. On the 6th day of January, 1917, the plaintiff executed and delivered a formal release of this mortgage which was recorded. The instant foreclosure decree is based upon a mortgage executed November 18, 1916, recorded December 18, 1916, securing a note dated January 1, 1917. One of the covenants of this mortgage was: "To pay all taxes, assessments and charges, of every character, levied or charged in Nebraska, which are now, or may hereafter become liens upon said real estate." This mortgage secured the same debt as the mortgage formally released by plaintiff January 6, 1917. In 1917, and each of the subsequent years 1918 to 1922, inclusive, there were levied upon the premises covered by the mortgage, state, county, school and irrigation district taxes, all of which were regularly assessed and levied as provided by law. The date upon which the particular irrigation assessment for the year becomes a lien is fixed in section 2877, Comp. St. 1922, as the 1st day of October in the year in which it is assessed. The state, county and school taxes were a lien from the 1st day of October of the year in which levied, under the 1903 revenue act, December 1st under the 1921 act, section 5822, Comp. St. 1922.

The taxes levied from 1917 to 1922, inclusive, have not been paid. In 1903 a new general revenue act was passed, the first since 1879. Section 17, ch. 73, Laws 1903, of that act provides: "All general taxes due the state, county, school district, irrigation districts, town, road districts, city or village, shall be a first lien on the real estate on

which levied and take priority over all other incumbrances and liens thereon." This section was in force until the 1921 law, where it appears as: "All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied and take priority over all incumbrances and liens thereon." Comp. St. 1922, sec. 5825.

Statutory provisions in force at the time of the execution of a mortgage enter into and become a part of the contract. The 1910 mortgage which was assigned to plaintiff and formally released and the new mortgage of 1916 upon which the decree of foreclosure is based were contract liens upon land in an irrigation district, both subject to such liens of the kind specified as may afterward be acquired under the statute. Plaintiff contends that the assessments due the irrigation district are not in a strict sense taxes, but are special assessments, the lien of which is positively fixed by section 2877, *supra*, relating to irrigation districts. There is no attempt to fix priorities in this section as between liens. Reference for that must be made to section 17 of the 1903 act, and section 5825, *supra*. On the question of priority of special assessments over existing liens created by contract plaintiff cites *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, and *City of Lincoln v. Lincoln Street R. Co.*, on second appeal, 67 Neb. 469. The first opinion, 61 Neb 109, was filed January 4, 1901, and the second opinion, 67 Neb. 469, February 4, 1903, while section 17, ch. 73, *supra*, became effective September 1, 1903. In these cases a contract lien was held superior to certain special paving assessments, but such holding was because of a statute, section 79, art I, ch. 13*a*, Comp. St. 1899.

Board of Commissioners v. Northwestern Mutual Life Ins. Co., 114 Neb. 596, cited by plaintiff, does not apply. There a drainage special assessment was held inferior to the contract lien because notice was not given to the mortgagee of record of the proposed organization of the district. There was no regularly assessed and levied special assess-

ment to create a lien so far as the mortgagee was concerned.

There is a distinction between the meaning of "taxes" and "assessments" based on different classes of public burdens. Taxes are imposed for general revenue, assessments for public improvements, mainly locally beneficial. Irrigation districts are quasi-public corporations in the sense that they are organized for general public good, with power to assess property within their boundaries for the purpose of raising sufficient revenue to secure water to irrigate arid lands. Irrigation districts have the power to levy taxes in the nature of assessments. This power is defined by statute. By including "irrigation districts" in section 17, *supra,* in reference to priority of taxes over contract liens, necessarily what taxing powers the district had would be intended. The priority between general taxes and special assessments is provided for in section 5826, Comp. St. 1922.

Assuming the existence of the taxes, we are forced to the conclusion that the trial court properly found plaintiff's contract lien inferior thereto.

Plaintiff and coappellant both claim that the irrigation district had no right or power to levy any special assessments on the land involved in the instant foreclosure because the same was sold with a perpetual water right attached. In view of the stipulation entered into, this contention is without merit. It was agreed that in the year 1917 "there was duly levied and assessed by the proper officials of the Farmers Irrigation District, in due form of law, upon the premises in controversy, the sum of $268.80 for general irrigation district purposes and the further sum of $134.41 for bond fund; that said assessment was duly certified by the county clerk of Scotts Bluff county, Nebraska, and duly enrolled upon the assessment rolls of Scotts Bluff county, which rolls were delivered to the county treasurer of Scotts Bluff county in accordance with the laws of Nebraska." "That for the years 1918, 1919, 1920, 1921, and 1922, there were duly levied and assessed by the

proper officials of the county and of the Farmers Irrigation District, which levies and assessments were duly enrolled and duly certified, all as required by the laws of the state of Nebraska, sums for state, county, school district taxes and for irrigation district taxes and assessments for the respective years and in the amounts following, all of which assessments were made upon the premises in this action." "That for all years subsequent to 1912 the Farmers Irrigation District duly levied and assessed taxes for irrigation purposes in accordance with the laws of the state of Nebraska, in funds for general irrigation purposes and for bond payment purposes; that such assessments and taxes for the years prior to 1917 were paid by the owner of said premises." It was further stipulated that the Farmers Irrigation District was duly organized in accordance with the statutes; that the premises were within its boundaries and have remained therein to date. Plaintiff and coappellant, having stipulated the organization of the district as legal, and the due levy and assessment of the taxes for irrigation purposes, cannot now challenge the right and power of the district to levy the assessments.

For the purpose of the instant case, we must assume the irrigation district had the right and power to levy the assessments in controversy. A direct agreement of the due exercise of a power ordinarily precludes asserting want of power.

1917 taxes on the land became delinquent, were advertised for sale, and were not sold for want of bidders. On December 16, 1918, the county treasurer of Scotts Bluff county issued a tax sale certificate to the irrigation district for these delinquent 1917 taxes. For the respective years 1918 to 1922, inclusive, the county treasurer issued tax receipts reciting that the taxes were paid by the irrigation district on this land as subsequent taxes. The tax sale certificate and the tax receipts reciting payment of taxes subsequent were retained by the county treasurer, were never delivered to the irrigation district, and are now a part of the records of his office. Nothing was received by the

treasurer for the tax sale certificate nor for the respective tax receipts issued as paid subsequent. No payment on account of the taxes and assessments for the years 1917 to 1922, inclusive, on coappellant's land has ever been made to the county treasurer, to the officials of any governmental subdivision, or to the officials of the irrigation district, and no part of said taxes have been actually paid. Under these conditions, plaintiff and his coappellant earnestly contend that all the taxes included in the tax sale certificate and noted as paid subsequent should be canceled of record; that the tax liens thereunder are destroyed and of no force and effect because the purchaser failed to enforce its tax sale certificate.

There are two distinct processes to the exercise of the power of taxation. One relates to the levying of the tax, the other to the collection of the taxes levied. A tax sale certificate comes under the provisions of the law which prescribe the manner of enforcing the payment of tax liens. The lien of taxes regularly levied on real estate is, ordinarily, perpetual and can be divested only by payment or in some manner authorized by statute. The way provided under our various revenue acts for a county or irrigation district to enforce its tax liens is by foreclosure and judicial sale. This cannot be done except based upon a tax deed or tax sale certificate. Delinquent taxes are advertised and the individual acquires a tax sale certificate upon the payment of money or its equivalent. The law maintains the lien in force for the statutory period to enable the purchaser to get his money with interest. If the individual purchaser takes no steps to enforce the tax lien which is acquired by the payment of money, it may be lost and the lien is canceled. However, in such event the county or irrigation district has received its taxes. When the county or governmental subdivision acquires a tax sale certificate no money is paid. It is simply a means to enforce the payment of the lien of taxes. If the statutory period passes without the county or irrigation district taking any steps to enforce the lien, the lien itself is not lost, because no pay-

ment of the lien has been made. In order to enforce the lien a repurchase of the taxes must be made for the years covered by the prior purchase. *Valley County v. Milford*, 70 Neb. 313; *Logan County v. Carnahan*, 66 Neb. 685, 693; Comp. St. 1922, sec. 2877.

In the instant case the state, county, school district and irrigation district have had no actual payment of the respective tax liens. They still exist, but the right to enforce them under the tax sale certificate issued has been lost. The stipulation by the parties that no money or its equivalent has been received by the county treasurer, the Farmers Irrigation District, or any of the officials thereof, nor any other governmental subdivision, for the taxes or assessments or any part thereof, makes plaintiff's and coappellant's contentions that these taxes do not exist and should be canceled and annulled untenable.

The trial court rendered proper decree under the issues and stipulation, and its judgment is in all things

AFFIRMED.

SOPHIA E. SHANAHAN, APPELLEE, V. FIDELITY-PHENIX INSURANCE COMPANY, APPELLANT.

FILED JUNE 1, 1928. No. 25986.

1. **Limitation of Actions: REFORMATION OF CONTRACT: FRAUD.** A cause of action to reform a contract of insurance for fraud or mutual mistake is barred by the statute of limitations in four years after the discovery of the fraud or mistake.
2. ———: ———: ———. Where an action at law is brought within the period of limitations upon an insurance policy, an amended petition seeking to reform the policy declares upon a new cause of action, and is barred by the statute of limitations, unless the amended petition is filed within four years from the time the cause of action declared upon accrued.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

Stout, Rose, Wells & Martin and *Winthrop B. Lane,* for appellant.

W. F. Moran and *Edwin Moran, contra.*

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

REDICK, District Judge.

Action to reform a fire insurance policy and to recover a loss sustained thereunder. The property in question constituted the homestead of Sophia and Robert Shanahan, the title being in Robert. For several years prior to the issuance of the policy, plaintiff was living in the premises and the husband, Robert, was living in Colorado, but in September 1922, he returned to Nebraska City and was living with his wife in the premises at the time of the fire. The policy was issued June 10, 1920, for $2,000, in the name of Robert M. Shanahan, during his absence, and the premium paid by plaintiff.

The original petition by Sophia E. Shanahan against the insurance company and her husband was based upon the proposition that, as plaintiff had paid the premium and the property constituted the homestead of the parties, she was entitled to sue upon the policy. It was alleged in the petition, *inter alia,* that the husband was insolvent and attempting to collect the loss and use it for his own purposes without repairing the building, and an injunction was asked restraining the insurance company from paying the amount of the loss to the husband. The loss was alleged at $700 and judgment asked therefor. The insurance company answered, admitting the issuance of the policy and an adjustment of the loss with the husband at $279.05, offering to pay that amount into court, which was subsequently done, where it still remains. The husband filed no answer, but made default. Plaintiff replied, but it will not be necessary to take special notice thereof. The case was submitted to the jury, who returned a verdict for

the plaintiff for $608.33, on which judgment was rendered. Defendant insurance company appealed, and the judgment was reversed on the ground that, the policy having been issued to Robert M. Shanahan and no reformation thereof having been asked, the plaintiff could not maintain the action. The opinion was by the commission and closed with the following paragraph:

"Now, it appears that the loss has been adjusted between the defendant insurance company and the husband, who was the insured named in the policy, and that the money due under the adjustment is now in court. The husband defaulted in the action, and no doubt, on the record as it stands, the trial court has the authority to order the amount now in court turned over to plaintiff. But the limit of the liability of the insurance company is the sum so paid into court. We recommend that the judgment of the trial court be reversed and the cause remanded for proceedings in harmony with this opinion."

The opinion of the commission was adopted by the court and mandate issued in accordance therewith. Thereupon plaintiff filed in the district court an amended and supplemental petition setting forth the same matters as in the original petition, and in addition alleging that there was a mutual mistake in inserting the name of Robert M. Shanahan in said policy, and that the intention was to insure plaintiff's interest in said property, and asking a reformation and for judgment for $700. A new summons was issued and served upon the insurance company, which filed an answer denying any mutual mistake, alleging that the decision of the supreme court was a final disposition of the case, and that the action for a reformation of the policy was barred by the statute of limitations, and other matters not necessary to be stated. The case was tried to the court and decree rendered finding that a mutual mistake had been made, and that it was the intention of plaintiff to insure her interest in said premises, and decreeing a reformation of the policy and a judgment for plaintiff in the sum of $591.42. The insurance company appealed.

Whether or not, in view of the decision and mandate upon the former appeal, the district court had authority to permit the filing of an amended and supplemental petition, or whether its sole duty was to order the money deposited in court paid over to the plaintiff, is a serious question, but one which we do not deem necessary to decide in view of our holding upon the other question in the case.

The policy was issued June 10, 1920. The amended petition was filed July 23, 1926. The statute of limitations of this state against an action to reform a contract for fraud or mutual mistake is four years from the discovery of the fraud or mistake. Plaintiff's contention that the amended petition merely amplifies the cause of action set forth in the original petition cannot be sustained. The amended petition is upon an entirely different cause, which is barred by the statute. *Clifford v. Thun*, 74 Neb. 831. Plaintiff was aware of all the facts at the time the policy was issued. The evidence is undisputed that the policy was intended to be written in the name of Robert M. Shanahan, that matter having been discussed between plaintiff and the agent of the company, the latter informing the plaintiff that it would have to be so written as the title was in Robert. The plaintiff claims that the agent stated that in case of fire the house would be repaired. Defendant's agent denied this, but admits he may have stated that the house would be repaired or the loss paid at the option of the company, which is in accordance with the policy as issued. The evidence is entirely insufficient to establish any fraud, and the question is immaterial in view of the fact that payment of the loss is secured to plaintiff by the decree upon the former appeal.

As to the amount of the loss, we think the adjustment between the insurance company and Robert M. Shanahan, in the absence of any claim of fraud or mistake, is binding upon the plaintiff. She executed no proofs of loss and made no claim against the insurance company until the bringing of this suit, and we think the decision upon the former appeal is the law of the case on this question. It

further appears that since the loss by fire plaintiff and her husband have been divorced and the real estate in question conveyed to plaintiff. It is therefore proper that the fund in court be paid to plaintiff.

It is therefore ordered that the judgment of the district court be reversed and the cause remanded, with instructions to pay the fund in court to the plaintiff and dismiss the action.

REVERSED.

JOHN W. KELSO, APPELLEE, V. SEWARD COUNTY, APPELLEE: STANDARD BRIDGE COMPANY, APPELLANT.

FILED JUNE 1, 1928. No. 25685.

1. **Negligence**: EXCAVATION IN HIGHWAY. Under the circumstances of this case, a motor car driver plunging into an excavation in a public highway at night is entitled to recover when barricade was down and warning lantern not burning.
2. **Appeal.** When ultimate responsibility rests with one defendant, he cannot complain that the jury did not also find against his codefendant.
3. ———: INSTRUCTIONS. When an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof.

APPEAL from the district court for Seward county: HARRY D. LANDIS, JUDGE. *Affirmed.*

John W. Battin and C. A. Sorensen, for appellant.

Claude S. Wilson, Thomas, Vail & Stoner, Roy F. Gilkeson, Hymen Rosenberg, McKillip & Barth and *Albert S. Johnston, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., and REDICK and WHEELER, District Judges.

WHEELER, District Judge.

The action was brought to recover damages to plaintiff's

motor car and for personal injuries sustained from driving into an excavation on the public highway a few miles north of Seward, Nebraska.

The defendant Standard Bridge Company, by contract with the defendant Seward county, was engaged in the construction of a new bridge. The new bridge was several feet shorter than the old one and during the construction operations an excavation eight or ten feet wide and about eight feet deep extended across the highway on both ends of the bridge. The defendant had provided a detour around the bridge, erected a barricade across the highway at each end and hung a red lantern on the bridge. About 4 o'clock on the morning of October 4, 1924, the plaintiff, driving his Maxwell car in a southerly direction, plunged into the excavation. The barricade was down; the warning lantern on the bridge was out. The question of defendant's care in erecting and maintaining suitable barricades and warning signals was submitted to the jury under proper instructions. Plaintiff recovered a verdict of $1,500 against the defendant Standard Bridge Company, but failed to recover against Seward county. The verdict is amply supported by the evidence as to damage to plaintiff's car, personal injuries actually sustained, negligence on the part of the defendant, and lack of negligence on plaintiff's part.

We were not favored with an oral argument. The negligence of defendant is not seriously controverted in defendant's brief, but the errors relied on for reversal in defendant's brief are: (1) The inconsistency of the verdict as being against the bridge company only, and not against the county; (2) the wording of the court's instruction on comparative negligence.

It is argued that the obligation of maintaining a safe highway, of keeping barricades up and warning signals lighted, rested equally upon the county and the bridge contractor, and that the jury could not consistently find negligence on the part of the bridge contractor, and not on the part of the county. The evidence is ample to sustain

a verdict against the county, had the jury rendered one. It would seem that defendant bridge company could not object merely because there was no verdict rendered against the codefendant, Seward county. Plaintiff could object, but did not. In *Cleland v. Anderson*, 66 Neb. 252, we held that, while a plaintiff could complain of a verdict as inconsistent in holding one of several joint defendants liable, the defendants could not. This seems logical, but we strayed from this doctrine in *Gerner v. Yates*, 61 Neb. 100, and in *Mansfield v. Farmers State Bank*, 112 Neb. 583. The point, however, is immaterial to the correct determination of this action. The contract between Seward county and the Standard Bridge Company, erroneously refused admission as evidence, is attached to the record and shows that the defendant Standard Bridge Company contracted to hold Seward county harmless from any claim for damages brought in consequence of any neglect to safeguard the work. Even if the verdict had been against both defendants, under its contract with Seward county, the defendant bridge company would have been obligated to pay it. The contract should have been admitted in evidence. The jury reached the same conclusion as would have been reached had judgment been obtained against both defendants and Seward county been required to sue the defendant bridge company on the contract. There is no need of "going around Robin Hood's barn" to reach the correct conclusion. The judgment in this case as it now stands is right.

The other complaint is the wording of the court's instruction No. 17 on comparative negligence. It is almost impossible to frame an instruction in such language that exception cannot be taken to it. Reasonably astute counsel can find as many faults with an instruction as with an abstract, but no case should be reversed unless the instruction is actually misleading. In the case at bar no better instruction was submitted by the defendants on the question of comparative negligence.

The comparative negligence statute, section 8834, Comp. St. 1922, reads as follows:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

The court's instruction No. 17 covering the subject reads as follows:

"The law is, however, that the contributory negligence of the plaintiff shall not bar him of his recovery in case his contributory negligence is slight and that of the defendants gross in comparison, but in such cases the contributory negligence of the plaintiff, if any such is proved, shall be considered by the jury in mitigation of damages in proportion to the contributory negligence attributable to him. If, therefore, you find and believe, from the evidence that the defendants were guilty of negligence proximately causing the accident, and that the plaintiff was negligent too, and negligent in a way that contributed to the accident as a proximate cause, but that the contributory negligence of the plaintiff was slight and the negligence of the defendants was gross in comparison, you may yet properly find for the plaintiff, but in arriving at the amount of his recovery you should consider the contributory negligence of the plaintiff in mitigation of his damages in proportion to the amount of contributory negligence attributable to him."

The court's instruction is an approximately correct exposition of the statute. It is true that it omits to stress the proposition that, if the negligence of the defendants falls in any degree short of gross negligence under the circum-

stances, the contributory negligence of the plaintiff, however slight, will defeat a recovery, which this court has approved in *Morrison v. Scotts Bluff County*, 104 Neb. 254, and *Mitchell v. Missouri P. R. Co.*, 114 Neb. 72. The court's instructions were couched in such terms as to convey a correct meaning of an abstruse statute to an ordinary juryman. The omission of a further dilation upon slight and gross negligence was, we think, immaterial in the jury's determination of the issues. No substantial miscarriage of justice has actually occurred. The error, if any, was immaterial and should be disregarded.

The judgment being so well substantiated by the evidence, and no material errors appearing in the record, it should be affirmed without further delay.

AFFIRMED.

EDWIN LYMAN, ADMINISTRATOR, APPELLEE, V. WALTER B. HALL, APPELLANT.

FILED JUNE 8, 1928. No. 25874.

1. **Negligence:** PUBLIC BATHING RESORTS. Failure to place and maintain warning signs or notices indicating the depths of water in different parts of a public bathing pool conducted for private gain may be evidence of negligence.
2. ———: ———: DUTY OF PROPRIETORS. "Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep some one on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting search." 22 A. L. R. 636; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, and 50 Neb. 214.
3. ———: ———: ———. "Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing." *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.
4. ———: ———: ———. It is the duty of a bathing resort

keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance.

5. ———: ———: ———: CARE REQUIRED. Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect.

6. ———: ———: ———. The duty to exercise ordinary care to protect patrons of a public bathing resort conducted for private gain does not make the proprietor an insurer of their safety.

7. ———: ———: DEATH OF BATHER: PROXIMATE CAUSE. Evidence of negligence does not of itself establish a cause of action, but in addition plaintiff must show that negligence pleaded by him was the proximate cause of the alleged injury.

8. ———: SUFFICIENCY OF EVIDENCE. In an action against the proprietor of a bathing resort to recover damages for the death of a bather by drowning, the evidence outlined in the opinion *held* insufficient to sustain a verdict in favor of plaintiff.

APPEAL from the district court for Hitchcock county: CHARLES E. ELDRED, JUDGE. *Reversed and dismissed.*

Butler & James and *J. F. Ratcliff*, for appellant.

Scott & Scott, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

ROSE, J.

This is an action against the proprietor and keeper of a public bathing pool to recover damages in the sum of $20,200 for alleged negligence resulting in the death of Richard A. Lyman. He was drowned in deep water while bathing in the pool. His father, Edwin Lyman, instituted the action as administrator of decedent's estate. Walter B. Hall is defendant, and the negligence imputed to him consists of his failure to give proper notice of the depth of water in different parts of the pool; to provide suitable

guards and directors; to provide competent persons to recover and resuscitate bathers when overcome by water.

Defendant in his answer admitted that he owned and operated the bathing pool and that plaintiff's son was drowned therein, but denied the negligence charged in the petition and pleaded contributory negligence of the son as the proximate cause of his death. The reply to the answer was a general denial.

Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $5,000, which was reduced by remittitur to $3,000. From a judgment for the latter sum, defendant appealed.

The principal assignment of error assails the overruling of a motion to direct a verdict in favor of defendant on the ground that the evidence was insufficient to prove actionable negligence as the proximate cause of the bather's death.

Failure to place and maintain warning signs or notices indicating the depths of water in different parts of a public bathing pool conducted for private gain may be evidence of negligence. *Beaman v. Grooms*, 138 Tenn. 320, L. R. A. 1918B, 305; *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.

A leading case on the liability for negligence in conducting for private gain a public bathing resort is *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, and 50 Neb. 214. That case has been cited in many jurisdictions. The main features of the opinion were recently reduced in an illuminating note by an annotator to the following form:

"Proprietors of a bathing resort, in discharging the duty of ordinary care for the safety of patrons, may be obliged to keep some one on duty to supervise bathers and rescue any apparently in danger; and may also be held liable for negligence if, on information that a bather is missing, they are tardy in instituting search." 22 A. L. R. 636, and discussion of later cases.

The supreme court of Utah also expressed the view that

proper care for the safety of bathers may require the attendance of some suitable person with the necessary appliances to effect rescues, saying:

"Not only is it the duty of the owners of bathing resorts to be prepared to rescue those who may get into danger while in bathing, but it is their duty to act with promptness, and make every reasonable effort to search for, and, if possible, recover those who are known to be missing." *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 3 L. R. A. n. s. 982.

It is the duty of a bathing resort keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance. *Decatur Amusement Park Co. v. Porter*, 137 Ill. App. 448.

Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect. *Levinski v. Cooper*, 142 S. W. (Tex. Civ. App.) 959.

The duty to exercise ordinary care to protect patrons of a public bathing resort conducted for private gain does not make the proprietor an insurer of their safety. *Bertalot v. Kinnare*, 72 Ill. App. 52; *Rom v. Huber*, 93 N. J. Law, 360, 94 N. J. Law, 258; *Levinski v Cooper*, 142 S. W. (Tex. Civ. App.) 959.

Evidence of negligence does not of itself establish a cause of action, but in addition plaintiff must show that negligence pleaded by him was the proximate cause of the alleged injury.

With these principles of law in mind, did plaintiff prove that actionable negligence pleaded by him was the proximate cause of the bather's death? The answer depends on the evidence and the inferences from evidential facts and circumstances and requires consideration of nearly 200 pages of testimony.

Some of the material facts are not in dispute. For pri-

vate gain defendant conducted a public bathing and swimming pool in what was called "Riverview Park," a resort at or near Stratton, Nebraska. Lengthwise the pool extended east and west. On or near the north bank a bathhouse, a refreshment stand, a diving board, and a diving tower were located. On the south side there were swings, a spring board and a band stand. Richard A. Lyman, a boy about 16 years of age, residing at McDonald, Kansas, and a younger brother were at Riverview Park July 4, 1926. In the afternoon they rented and paid for the use of bathing suits and went into the pool. They were in and out of the water at different times. Richard was strong both mentally and physically, but he could swim very little, if any, and between 4 and 5 o'clock, or a little later, he was drowned near the center of the pool in deep water. The story disclosed by the record cannot be read without emotion, but the sufficiency of the evidence to sustain the verdict must be determined independently of sentiment or pity.

Was defendant negligent in failing to perform his duty to give notice or warning indicating the depth of the water in different places? The pool was approximately 100 feet wide and 300 feet long. It had a sandy bottom sloping from a depth of 2½ feet at the west end to nearly 19 feet at the east end. There were three divisions indicated by two heavy steel cables stretched across the pool from north to south at the surface of the water. The first division was for little folks. It was 20 feet wide at the west end of the pool and near the north bank there was a sign: "Water not over 2½ feet deep." The next or middle division was apparently for general bathing. It was 30 feet wide and near the north bank between the cables there was a sign: "Water not over 4½ feet deep." The other division was that part of the pool between the east cable and the east end. It was obviously intended for swimming, diving and other aquatic sports. In size it was approximately 250 feet east and west and 100 feet north and south. Near the east cable on the north side of the pool there was a sign: "Deep Water. If you cannot swim, stay out." It was around the

latter division that the diving board, the diving tower and the spring board were located—all indicating deep water. In addition there was a life-boat near the bath-house. It was equipped with oars, rope and grappling hooks. The rear end rested on the north bank and the front end was headed toward deep water. Above it there was a sign: "For Emergencies Only." In conspicuous places in the bath-house where Richard A. Lyman and his younger brother rented bathing suits there were in large letters signs containing these words:

"No charge, whatever, is made for either the swings or slide, and we assume no responsibility, whatever, for any accident that may occur in their use. Unless you are an experienced swimmer and diver you are requested not to use them."

At the trial there was an effort to show that the letters on the signs were too small to impart notice for a sufficient distance; that the signs indicating the depth of the water were not high enough to prevent the bank from obscuring them; that the crowds between the signs and the bath-house cut off the view; and that personal warning was not given to the Lyman boys. They were together and were in and out of the pool for two hours or more. They were not seen in deep water. The circumstances indicate that they knew where the water was deep. The younger brother kept in the safety zone. Richard had the same opportunity for observation. He was a bright boy nearly 16 years of age. The slightest prompting of his own senses would have resulted in observing the depths of the water at different places, notwithstanding the crowds. The signs indicating the depth of the water were on the top of steel posts with the lower ends in the ground under the pool. The notices were above the water and faced toward the bath-house where they could be seen by bathers approaching the pool. There is nothing to show that the signs did not conform to the usual custom at bathing resorts or that defendant did not, in this respect, take such precautions for the safety of bathers as a person of ordinary prudence

would have taken under the circumstances. It seems clear that the verdict cannot be upheld for want of notice of the depths of the water and that, therefore, there was error in submitting that issue to the jury.

Was defendant's failure to provide suitable guards and directors the proximate cause of the bather's death? Two employees of defendant, according to their testimony, were qualified to act in those capacities and they said on the witness-stand that they were on active duty at the time. There was no charge or proof that more than two guards were necessary. Unless they were contradicted by circumstances or by failure to perform their duties in the emergency that confronted them, evidence of their qualification and of their proper services was not disproved. There were 50 or more persons in the pool. No one saw Richard as he was disappearing. How or when he got into deep water was not disclosed. He was missed by his younger brother who said on the witness-stand that he had seen some one struggling in the water and had thought it might be Richard, but the witness was apparently not satisfied with his identification, because he went to the bath-house to make a search and, not seeing Richard in the pool or elsewhere, an alarm was given. One of the guards testified he was at the time on duty over-looking the pool from the bathhouse. At the first alarm he ran to the life-boat, rowed south to the spring-board, the natural place to look for a missing swimmer, and began to cast with grappling hooks. He was joined at the spring-board platform by the other guard. After casting in vain five or six times, some one said the boy was farther north. The boat was then rowed northward near the center of the pool, where the water was at least seven feet deep. The second cast there resulted in bringing the boy's body to the surface. It was taken to the bank. Efforts at resuscitation were immediately made and were continued without avail for an hour or more. For the purpose of showing negligence, plaintiff adduced proof that the guard who first reached the life-boat had sold refreshments in the stand at different times

during the afternoon and was not continuously at his post of duty as a guard. This was not evidence of actionable negligence in the present case, if he was attentively watching the pool at the proper place for rescue when the bather disappeared, and his testimony to that effect is uncontradicted. The service of a life-guard may be required at different places at different times. Where many swimmers are engaged in aquatic sports in the same pool, it is common knowledge that divers disappear and return at other places without giving occasion for alarm or rescue. In the present instance no one knew exactly when or where the bather disappeared. Without resorting to speculation or conjecture the jury could not properly find that, except for the failure of the guard to miss the bather and to notice that he did not promptly reappear, there would have been no loss of life. The effort to rescue the bather upon the giving of the alarm was prompt and vigilant. There was evidence that the guards did not wear uniforms or badges to distinguish them from others as life-savers, but they immediately responded to the call of duty as soon as the alarm was given, and the omission, if negligence, was not the proximate cause of the bather's death. It follows that this issue also should not have been submitted to the jury.

Was defendant's failure to provide competent persons to recover and resuscitate the bather the proximate cause of his death? On this issue the evidence showed that defendant had not equipped his life-boat or bathing resort with a pulmotor, a modern instrument used in the work of resuscitation. On the other hand, there is uncontradicted evidence by a competent physician that the guards in a proper manner used standard methods of equal efficacy. The physician was promptly called, arrived within a few minutes and administered restoratives without success. He was called as a witness and in testifying expressed the opinion that the result would have been the same had a pulmotor been used. There was no testimony to the contrary. On the whole case, after an examination of the entire record

from every standpoint, the conclusion is that the plaintiff did not make a case and that the motion to direct a verdict in favor of defendant should have been sustained. Consequently, the judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

CLARENCE J. DAVIS, APPELLEE, V. LINCOLN COUNTY, APPELLANT.

FILED JUNE 8, 1928. No. 26447.

Master and Servant: INJURY TO EMPLOYEE: COMPENSATION. Evidence examined, and *held*, (a) to establish a compensable status in the plaintiff; (b) to sustain the degree of physical impairment as determined by the trial court, and the amount of compensation awarded therefor; (c) that the plaintiff was entitled to the allowance of a reasonable attorney's fee in the district court, and that the amount awarded, in view of the record, is not excessive.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

William E. Shuman, George N. Gibbs, and *A. J. Rhodes,* for appellant.

Hoagland, Carr & Beck and *Halligan, Beatty & Halligan, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

EBERLY, J.

Clarence J. Davis was awarded compensation by the labor commissioner of the state of Nebraska against the county of Lincoln, Nebraska. Upon appeal by the county of Lincoln to the district court for that county, Davis recovered a judgment against the county of Lincoln for "$15 each week" for a period of 300 weeks, to begin to run from

February 6, 1925, (less 142 weeks already paid), and $12 a week, "from and after the last payment of compensation at $15 a week, for the remainder of his life." Attorney's fees were also taxed in the district court in the sum of $750. From this judgment the county of Lincoln appeals.

The contentions presented by the county on appeal are: (1) That the relation then existing between the county and the plaintiff at the time of the accident did not create a compensable status in the latter; (2) that the evidence of physical impairment does not sustain the degree of physical disability as determined by the trial court; (3) that the amount of the award is not sustained by the facts of the record, even though the degree of disability, as determined by the trial court, exists; (4) that the attorney's fees allowed are not authorized by the act under the circumstances of the case, and, if authorized, must be deemed excessive.

The evidence discloses without dispute that Davis had been employed by the corporate authorities of Lincoln county, Nebraska, in addition to other duties, to care for, supervise and perform necessary services in connection with the maintenance and protection of three bridges across the Platte river situated in Lincoln county, Nebraska, as occasion for such repairs and protection might from time to time arise. The services contracted for contemplated and involved, not only such repairs as might be incident to ordinary wear and tear, but also such as were necessary for the proper protection against the effect of the elements, storms, floods, and ice. For this purpose Davis was furnished by the county with appropriate tools and supplies, including "spud bars," for opening holes in ice for reception of blasting charges, pike poles, dynamite, powder, fuses, and caps. The last enumerated were for use in protecting the bridge during the season when the ice, formed in the Platte river during winter months, was breaking up, by preventing the formation of jams and ice gorges about the bridge or in the vicinity thereof which might be dangerous thereto. Plaintiff's contract did not involve con-

tinuous labor. His services necessarily would have to be employed whenever required for the proper protection of the bridges when, due to the forces of nature, the safety of these structures was imperiled. Neither could the time be anticipated with any degree of certainty as to when the services contracted to be rendered by him would be required. The contract necessarily contemplated the performance of work and labor without reference to the day of the week or the time of day.

The nature and surroundings of the transaction and which were necessarily in contemplation of the parties to the contract were such as to support the further conclusion that a "7 day week" of labor was within the contemplation of the parties; for only in that way could the exigencies of the situation be met.

These contractual relations had been in existence for more than a year prior to the accident. Bills for services rendered had been duly presented to, allowed, and paid by, in the regular course of business, the county authorities.

On February 6, 1925, while working pursuant to this contract under the personal direction of one of the county commissioners of Lincoln county, Nebraska, and employed in blasting ice which was then menacing the safety of one of the bridges referred to, the plaintiff was injured by the accidental explosion of dynamite then being used by the plaintiff in the undertaking and which was furnished him by the defendant county through a county commissioner then present.

The transaction before us fairly brings the plaintiff within the meaning of the term "employee," and the county of Lincoln within the designation of the term "employer," as those terms are used in our workmen's compensation act. And it also follows that the relation existing at the time of the accident, in a legal sense, is to be deemed compensable. Comp. St. 1922, secs. 3029, 3037, 3038.

A careful examination of the question of fact involved brings us to the conclusion that the trial court did not err in its determination as to the degree of impairment

suffered by the plaintiff as a result of the accident. It is to be remembered in this connection that "On appeal from the district court to the supreme court in a workmen's compensation case, findings of fact supported by sufficient evidence and findings of fact on substantially conflicting evidence will not be reversed unless clearly wrong." *City of Fremont v. Lea*, 115 Neb. 565.

The findings made by the trial court in the case we are now considering are amply supported by the evidence, and, thus considered, disclose that the plaintiff herein was totally and permanently disabled within the meaning of the workmen's compensation act of Nebraska. Comp. St. 1922, sec. 3044 (3); *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161; *Johnson v. David Cole Creamery Co.*, 109 Neb. 707; *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332.

It is contended on behalf of the county that the instant case presents the case of "continuous employment" as that term is used in section 3049, Comp. St. 1922, and that, therefore, the last clause, or rather sentence, of that section is controlling as fixing the basis of compensation.

"Employment," as defined by Webster, is: "1. Act of employing, or state of being employed. 2. That which engages or occupies; that which consumes time or attention; occupation; office or post of business; service." Webster's New International Dictionary.

It is obvious that the second, and not the first, clause of the definition is applicable to the term "continuous employment" as that term is used in the statute now before us. This conclusion is in harmony with our statutory definition of "employment," in connection with cognate legislation, which treats this term as synonymous with "work" and definable as: "Manual or mechanical labor, clerical, domestic or professional service." Comp. St. 1922, sec. 7725. That statutory term, as employed in the workmen's compensation act, has reference only to that which, in accordance with the contract of hire, "continuously engages or occupies;" (or) continuously consumes the time or attention of

the employee. "Continuous employment," therefore, in the true sense of the statutory terms employed, in the act under consideration, exists only when service or labor required in the performance of the contract service is substantially continuous. In the present case, while the county, by the terms of the contract of hire, had a paramount and continuous claim on the time and services of plaintiff, yet the services required thereunder, as a matter of fact, were not continuous. The terms of the contract of hire established by the record, not only permitted, but the parties thereto evidently contemplated that the plaintiff would engage in many other tasks, employments, or occupations, in addition to that referred to in the contract of hire. He was paid only for time actually devoted to the county interests. When he daily changed his occupation or "employment," it could not be contended that his employment, devoted to the benefit of the county, remained continuous.

It follows that the relation existing between the plaintiff herein and the county of Lincoln, under the terms of their contract and as carried out by plaintiff, was not that of "continuous employment." Therefore, the claim of the county that the basis of compensation in this case is the "average weekly income received from the county" cannot be accepted.

Section 3049, Comp. St. 1922, also provides: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." Following these general words appears a provision relative to "occupations involving seasonal employment or employments dependent upon the weather," and "continuous employment." The last we have already discussed, and it is insisted on part of the appellant that the employment in this case was not "seasonal" or not "dependent upon the weather." This contention is accepted.

It follows, therefore, that wages, as applied in this case,

are to be determined by the statutory language first quoted. Section 3049, *supra.*

Section 3044, Comp. St. 1922, as applied to the facts in the present case, provides in substance that, for the first 300 weeks of total disability, the compensation shall be 66 2-3 per centum of the wages received at the time of the injury, and thereafter 45 per centum of the wages received at the time of the injury. It also provides that, for disability resulting from permanent injury for specified classes of injuries, "the compensation shall be" a certain named "per centum of daily wages during" a time specified.

At the time of the injury received by the plaintiff, the money rate at which the services rendered were recompensed, under the contract of hire, was 35 cents an hour. This case being neither one involving a "seasonal employment" nor "continuous employment," the daily wage, as the basis of statutory compensation, must be computed on the basis of 35 cents an hour as the "wages received at time of injury."

We find the judgment of the district court consistent with the rule here laid down, and the same is approved.

The allowance of attorney's fees in the total sum of $750 is objected to. In this connection the record discloses that after two hearings before the labor commissioner of the state of Nebraska, and after an appeal to the district court, amendments to pleadings were allowed by the district court, over objection of the plaintiff, which injected new questions into the case. The issues were, in fact, substantially changed. This necessitated, on part of plaintiff's attorneys, new and additional investigations both of fact and of law. On the trial of the case the value of attorney's services as rendered was the subject of oral testimony. Two witnesses whose competency is unquestioned testified as to what the legal services were worth, as performed in connection with the trial in district court, and placed a reasonable value of the same at $750. The qualifications, good faith and honesty of the witnesses are unquestioned in the record. No testimony whatever was produced by the coun-

ty to meet this evidence. Not a syllable appears in the bill of exceptions which in any manner qualifies, refutes or contradicts the unanimous conclusion which was placed before the court. The district judge who presided at the trial observed in a large degree the actual performance of the services testified to; he heard the witnesses; their uncontradicted testimony was accepted by him; and he found in accordance therewith.

Section 3048, Comp. St. 1922, provides: "Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award."

There can be no question in this case but what the employer appealed to the district court and failed to obtain a "reduction." It follows that the employee, under the facts of the record and as a matter of right, was entitled to have a reasonable attorney's fee taxed in his behalf in that tribunal. The question of a "reasonable attorney's fee" must be necessarily determined by the facts of the case in which allowed, and its amount is a matter, in a large degree, of discretion vested in the trial court. That discretion was exercised in the instant case, and in view of the record we cannot find that the district court erred in so doing.

It follows, therefore, that the judgment of the district court is correct, and is, in all things,

AFFIRMED.

JOHN BOSTEDER, APPELLEE, V. WILLIAM B. DULING, APPELLANT: MARY BARRETT, ADMINISTRATRIX, APPELLEE.

FILED JUNE 8, 1928. No. 26460.

1. **Appeal**: VERDICT. A verdict of the jury based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it

appears to be against the weight or preponderance of the evidence, as the weight of testimony is for the jury, and not for the appellate court.

2. ———: LAW OF THE CASE. The principle announced as controlling in our former opinion, as applicable to the facts of the record then before the court, viz., "An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable," in view of the record now presented, *held* to be "the law of the case."

3. **Evidence** examined, and *held* to support the verdict and judgment of the trial court.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Reavis & Beghtol, for appellant.

Allen & Requartte and *E. G. Maggi,* for appellee Duling.

Adams & Zimmerman, for appellee Barrett.

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action by John Bosteder, as plaintiff, for damages sustained by him occasioned by the wrongful acts and neglect of one William B. Duling and one Edward Barrett in connection with a defective ensilage cutting machine jointly owned by them. From a verdict and judgment in favor of the plaintiff and against both defendants, Duling alone appeals. Mary Barrett, the original defendant, as administratrix of the estate of Edward Barrett, deceased, however, also presents a brief in behalf of Barrett's estate.

This is the second appearance of this controversy in this court. *Bosteder v. Duling,* 115 Neb. 557.

Duling challenges the correctness of the adjudication against him on the general ground that the evidence is insufficient to sustain it. This general proposition as urged by him applies to three distinct questions arising in the

record, viz.: (1) That the evidence in no manner sustains the judgment against either of the defendants; (2) that the evidence establishes affirmatively that, at the time of the injury, Duling had "loaned" the plaintiff's services, with plaintiff's consent, to the defendant Barrett under such circumstances and conditions as to constitute Barrett plaintiff's sole master, and that thus the recovery against Duling could not be sustained; (3) assumption of risk on part of plaintiff.

At the former trial of this case in the district court that tribunal, at the close of plaintiff's evidence, sustained a motion directing a verdict for the defendants. On review of this proceeding, this court held that the determination thus made was "clearly against the weight of the evidence and the law applicable thereto." Reference is here made to the opinion by Thompson, J., in that case for statement of facts established by the evidence at the time before the court. *Bosteder v. Duling, supra.*

In the record now before us appears substantially all of the evidence presented for consideration of this tribunal at the first hearing thereof, together with additional evidence, cumulative in nature, introduced by plaintiff. The defendant also introduced evidence at the last trial in the district court which, at most, may be deemed contradictory to that of plaintiff. But the jury, in consideration of the conflicting evidence, found generally for the plaintiff and against the defendants on the issues of fact thus presented in the record and submitted to their determination. Their action is final. *Skala v. Michael,* 109 Neb. 305; *Caniglia v. Vacanti,* 106 Neb. 793.

On the question as to the joint liability of the defendants, in our former opinion appears the following statement with reference thereto: "The further question is presented that these defendants are not jointly liable, and, not being so, cannot under this record be held individually. The evidence presented brings this case clearly within our holding in *Schweppe v. Uhl,* 97 Neb. 328, wherein we held: 'An act wrongfully done by the joint agency or coopera-

tion of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.' Further, as held by us in *Koehn v. City of Hastings,* 114 Neb. 106: 'If one suffers injury and damage as the proximate result of the negligence of two others, and the damage would not have occurred but for the negligence of each of such parties, both are liable to the person so injured.' " *Bosteder v. Duling,* 115 Neb. 557.

It would, therefore, fairly appear that, on the controlling questions now presented, this court has heretofore deliberated, decided, and announced its determination. It follows, in view of the record before us, that the conclusions of this court thus announced in our former opinion must now be deemed to be the law of the case. *O'Hara v. Davis,* 109 Neb. 615; *Lawson v. Union P. R. Co.,* 113 Neb. 745; *Merkouras v. Chicago, B. & Q. R. Co.,* 104 Neb. 491; *State v. Farmers State Bank,* 106 Neb. 387; *Scott v. Scotts Bluff County,* 106 Neb. 355; *Brightenburg v. Mulcahy,* 109 Neb. 423; *Harris v. Central Power Co.,* 111 Neb. 565; *Kerr v. Travelers Ins. Co.,* 103 Neb. 566.

On the question of assumption of risk presented by appellant, a careful consideration of the evidence in the record sustains the conclusion that the proof presented to, and considered by, the jury was ample to sustain the verdict as returned by them in the instant case, which, in effect, negatived appellant's defense on this ground. Indeed, the unquestioned ultimate facts of the transaction, as established by the evidence in the record before us, are such that it is doubtful whether any of the theories advanced by the appellant would operate to discharge him from liability for the results of the accident or secure for him relief from the judgment entered herein. At least, it may be said that ample proof sustains the conclusion that the defective machine, occasioning the injuries complained of, was originally purchased by Duling and the now deceased Barrett jointly; that it continued to be their joint property of which each enjoyed equal control as equal owners thereof, and was such at the time of the acci-

dent; that this machine was purchased, owned and maintained by its proprietors expressly to do the work of each upon the farms occupied by each, and to be operated by the labor furnished by both. It is thus fairly inferable that it was thus contemplated from the beginning by the joint owners that, as occasion required in the ordinary prosecution of their farm work, the machine in question should not only be employed and used by them as individuals and their joint employees, if any, but would also be furnished to and used by their individual servants and employees. The record also sustains the further conclusion that the particular kind or class of work in which this defective machine was employed by its owners, though performed for the benefit of each coowner as an individual, was treated by them as a joint undertaking, to be participated in by both with a view of securing more economical as well as more efficient service and results. This transaction then, as an entirety, bears many earmarks of a joint adventure, and would seem to be controlled by the principles applicable to that relation. *Peterson v. Nichols,* 90 Wash. 398.

"A contract establishing a joint adventure need not be express, but may be implied from the conduct of the parties." *Jackson v. Hooper,* 76 N. J. Eq. 185.

While our present transaction did not involve direct profits of a mercantile nature, it did contemplate mutual benefits to the parties thereto. Besides, expectation of profits is not a necessary element of a joint adventure. *Moore v. Hillsdale County Telephone Co.,* 171 Mich. 388.

While joint ownership of property alone does not create it, "A 'joint adventure' may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefit; they each have the right to demand and expect from their associates good faith in all that relates to their common interests." *Jackson v. Hooper, supra.*

On the basis that we have before us what amounts to a

joint adventure, the rule applicable to the controversy would be: "Joint adventurers who are engaged in an enterprise requiring the use of mechanical contrivances are jointly and severally liable as joint tortfeasors." 33 C. J. 873, sec. 102. This question of joint adventure is, however, not necessary to the determination of this case. A careful examination of the facts of the record discloses that a simpler principle is applicable and a simpler question is controlling.

Defendant Duling admits joint ownership of the machine involved. The record sustains the evident conclusion of the jury that it was defective at the time of the accident, and that Duling knew it, or should have known it. Indeed, under his own evidence, there can be no question as to his knowledge, intent and purpose that on the day of this accident this defective machine was intended to be, and actually was, furnished to be operated by Bosteder in a place of danger. If Bosteder was then and there to be considered as the employee and servant of Duling, as a necessary incident of this employment would follow the duty of his master to furnish him with a reasonably safe instrumentality wherewith, and a reasonably safe place wherein, to do his work. But, on the other hand, if that contractual relation at the time of the accident be deemed as not to exist as to Duling, but to exist as between Bosteder and Barrett, still Duling, as an equal coowner of the defective machine furnished for Bosteder's use, under the facts in this case, was not relieved thereby from liability. The rule applicable to the then situation might, indeed, absolve him from liability as a master, but would be inoperative to absolve him from liability as a coowner furnishing machinery for the use of the servants of another.

"A person undertaking to furnish machinery or appliances for the use of the servants of another assumes a duty to furnish proper and safe appliances; and a negligent performance of such a duty, resulting in injuries to one engaged in doing the work or lawfully using the appli-

ances, imposes a liability on the person so furnishing the same for injuries sustained in consequence of such negligence. The obligation does not depend on a contractual relation between the person injured and the person whose negligence causes the injury, but on a failure to perform a duty assumed by one which results in injury to another." 18 R. C. L. 542, sec. 57. See, also, *D'Almeida v. Boston & Maine Railroad*, 209 Mass. 81; *Pearson v. Arlington Dock Co.*, 111 Wash. 14; *Roddy v. Missouri P. R. Co.*, 104 Mo. 234; *Bright v. Barnett & Record Co.*, 88 Wis. 299.

This court is committed to the view that it is a nondelegable duty of the master to exercise reasonable care to provide reasonably safe places to work, and to furnish reasonably safe and suitable appliances with which to work. This principle is alike applicable to him who undertakes to furnish machinery or appliances for use of the servants of another. If, in either case, he undertakes to perform this duty imposed by law through or by another, he acts at his own risk. If, therefore, the evidence be true that the plaintiff refused to work with this machine until repairs had first been made, and Duling was assured by Barrett that the machine had been fixed, when, in fact, it had not been repaired, and plaintiff, in turn, was induced by Duling to rely on Barrett's statement, good faith in the transaction can afford Duling no defense. And, on the other hand, if Duling had been duly notified or knew of the machine's defects and wholly failed to effect a correction thereof, he violated the plain duty which the fact of his coownership and the contemplated use of the machine imposed upon him, in view of the circumstances of this case.

In any event, therefore, it cannot be said that the verdict returned in this case and judgment entered thereon are not supported by the evidence of the record.

It therefore follows that the district court in the present case has proceeded in accord with law. The judgment of the district court is correct, and is

AFFIRMED.

HOWELL, J., dissents as to liability imposed on Duling.

CENTRAL NATIONAL BANK OF LINCOLN, APPELLEE, V. FIRST NATIONAL BANK OF GERING ET AL., APPELLANTS.

FILED JUNE 8, 1928. No. 25214.

1. **Banks and Banking: INSOLVENCY.** An action to impress a trust upon assets of an insolvent national bank is governed by federal law.
2. ———: ———: PREFERENCES. A *cestui que trust*, who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands.
3. ———: ———: ———. In such case, it is not sufficient to trace the trust property to the general assets of the estate and that it increased the value thereof.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Reversed.*

Morrow & Morrow, for appellants.

Field, Ricketts & Ricketts, Honnold & Clarke and *Mothersead & York, contra.*

Fred S. Berry, amicus curiæ.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

HOWELL, J.

This case was appealed from a decree of the lower court impressing a trust, in favor of the Central National Bank of Lincoln, upon the assets of the First National Bank of Gering, in the hands of Charles F. Lyman, receiver, growing out of four notes sent by the Lincoln bank to the Gering bank, while open for business, for collection and remittance of proceeds.

After being twice argued orally here, Good, J., wrote an opinion (115 Neb. 444), in which Dean, Thompson and Eberly, JJ., concurred, reversing the lower court over a dissenting opinion by Rose, J. (115 Neb. 451), in which Goss, C. J., and Day, J, concurred. Eberly, J., wrote a

separate concurring opinion (115 Neb. 457). After a third oral argument, Rose, J., delivered an opinion (115 Neb. 472) in which the former opinion was overruled, to which Good, Thompson and Eberly, JJ., dissented (115 Neb. 478). Since that time, Day, J., died and the writer has been added to the court in his stead. A fourth oral argument has been made to the court as it is at present constituted.

The writer has spent a prodigious amount of time in the examination of the record, numerous briefs, adjudicated cases and the several opinions written by members of this court in this case, and is not disposed to add very much to its literature. To harmonize the multiplied decisions of state and federal courts would be an impossible task.

The alleged trust fund has to do with the assets of an insolvent national banking institution being administered by a receiver under laws of congress. Sections 3234, 5236, U. S. Rev. St. (1878), provide for winding up the affairs of such banks and for a ratable distribution of their assets among creditors. What are assets presents a federal question which necessarily must be determined by the national courts or by rules approved by them. *Empire State Surety Co. v. Carroll County,* 194 Fed. 593, 603 (5). The same case holds: "It is indispensable to the maintenance by a *cestui que trust* of a claim to preferential payment out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and value thereof which came to the hands of the receiver." It is supported by *State Bank of Winfield v. Alva Security Bank,* 232 Fed. 847, *Dudley v. Richards,* 18 Fed. (2d) 876, and other cases.

The writer has been very reluctantly driven to the foregoing conclusions as to national banks, but withholds commitment as to trust funds not imperatively ruled by federal law. The judgment of the district court is reversed and the cause remanded.

REVERSED.

GOSS, C. J., and DEAN, J., dissent.

ROSE, J., dissenting.

If the appeal presents a federal question, an imperative duty calls for the independent judgment of each member of the court in determining the issue, because the supreme court of the United States, as I understand the situation, has not spoken the final word on the subject and the federal courts inferior to that tribunal do not agree on the proper solution.

I am unwilling to surrender my own ideas of justice and equity for what I conceive to be a fundamental error that will disturb the banking and other financial interests and perpetuate in the judicial department of government an evil at variance with established rules of equity and the demands of justice. I deny that the congress or the federal courts have committed state courts to the doctrine announced by the majority of my associates.

The present action is one in equity to restore trust funds misappropriated by a faithless trustee. The facts on which the diversity of opinion arose were formerly stated as follows:

"The First National Bank of Gering, defendant, received from the Central National Bank of Lincoln, plaintiff, and accepted three promissory notes, aggregating with interest $4,467.23, for the sole purpose of collecting and returning the amounts due plaintiff, the owner. To that purpose alone defendant was specifically limited in writing and became a trustee to perform the duty of a fiduciary while openly transacting a banking business. Defendant collected the notes, betrayed its trust, clandestinely credited to plaintiff on its books the proceeds of the notes, hid the trust funds in a wilderness of banking assets exceed-

ing on paper $440,000, where the converted trust property could not be identified, misappropriated the credits, wrecked the bank, went into the hands of a receiver and challenged plaintiff to trace its trust funds into a specific asset of the insolvent bank on penalty of having them taken by the general creditors of defendant. The proceeds of plaintiff's notes augmented the deposits in the insolvent bank, increased the general assets, replenished the depleted bank reserve and paid banking obligations to general creditors." *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 444, 452.

The converted proceeds of the notes were traced into the possession of the dishonest trustee. The effect of the majority opinion is to saddle on the innocent and confiding beneficiary of the trust the burden of showing what the trustee did with the plaintiff's or the beneficiary's trust fund after it had been misappropriated and mingled with a mass of banking assets over which plaintiff, the owner, had no control. This is contrary to the universal rule of equity that it is the duty of a trustee to disclose to his beneficiary what became of the trust property and to account for it. The philosophy on which this latter precept is based came down through the centuries from the Chancellor of Galilee Who dictated the hallowed petition, "Lead us not into temptation," and Who decreed, "No man can serve two masters." This violated rule requiring a disclosure by the trustee himself sparkles in the dust of evolutional equity like polished diamonds in the rubbish of ages. Departing therefrom the majority announce the following doctrines:

"A *cestui que trust*, who seeks a preference out of the estate of an insolvent national bank in the hands of a receiver, must clearly prove that the trust property, or its proceeds, went into a specific fund or property which came into his hands.

"In such case, it is not sufficient to trace the trust property to the general assets of the estate and that it increased the value thereof." *Central Nat. Bank v. First Nat. Bank, ante*, p. 161.

The attempt to justify those rulings includes an act of the congress relating to distribution of the assets of insolvent national banks, and also the enforcement of that act by a federal court which is not the final arbiter on the question here presented for determination. If the question were controlled by federal precedents, which I deny, the language used by another federal court and quoted with approval by a chief justice of the United States supreme court is better authority and has the support of cogent reasons:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor." *Peters v. Bain*, 133 U. S. 670, 693.

This doctrine is in harmony with a unanimous opinion of the supreme court of Nebraska, as shown by the following syllabus:

"Where a trustee mingles trust moneys with his own funds, *cestui qui trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust fund has entered remains in any form, it is subject to such charge, and may be followed and claimed." *City of Lincoln v. Morrison*, 64 Neb. 822.

Trust funds belonging to an innocent and confiding owner or beneficiary, when stolen or embezzled by an insolvent national bank acting in the capacity of trustee, and hid by it in a changed form among the general assets of the

bank are not bank assets in the hands of the receiver for the purpose of distribution to general creditors, within the meaning of the act of congress. If such a fund is not among the bank assets after it is traced by the beneficiary into them, the burden is on the dishonest trustee or the receiver to disclose that fact. The federal statute did not change the rules of evidence or the burden of proof or take away the accountability of the trustee as such. The federal Constitution protects the liberty to own and control property and neither the congress nor the court has power to take trust property from its hiding place, deprive the owner of it, and with it pay other debts of the false trustee.

I do not find in the federal statute anything to justify the rulings of the majority, nor do I impute to the legislative department of the federal government an intent to apply to the claims of general creditors private trust funds unlawfully in the assets of an insolvent national bank against the will of the owner. In absence of a ruling of the supreme court of the United States to the contrary, I shall attribute to the national congress the policy declared by Washington in his first inaugural address:

"The foundation of our national policy will be laid in the pure and immutable principles of private morality. There is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluable union between virtue and happiness; between duty and advantage; between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity."

I adhere to what was said by this court in the opinion affirming the decree in favor of plaintiff for the restoration of the trust funds in controversy. *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 472.

ELSIE ENGSTROM, APPELLANT, V. CECIL ENGSTROM, APPELLEE.

FILED JUNE 8, 1928. NO. 26091.

Bastards. The word "unmarried," as used in section 274, Comp. St. 1922, relates to the mother of an illegitimate child at the time it was begotten and born, and not at the time of making the complaint.

APPEAL from the district court for Nance county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

G. F. Rose, for appellant.

Kemp & Brower and *Lower & Sheehan, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

HOWELL, J.

This is an appeal from the sustaining of a demurrer by the district court to the complaint of prosecutrix and appellant in a bastardy proceeding. The complaint was in the following language: "On this 16th day of December, 1926, before me, G. F. Robinson, county judge within and for Nance county, Nebraska, personally appeared Elsie Engstrom, who, being by me first duly sworn, deposes and says upon oath that she is a resident of Nance county, in the state of Nebraska; that on the 30th day of March, 1925, she was delivered of a bastard child; that said child is still alive and residing with affiant; that affiant was at the birth of said child and at all times prior thereto an unmarried woman and that Cecil Engstrom is the father of said child."

A mere reading of the complaint, in connection with the statute relating to the subject before us, in the light of *Parker v. Nothomb,* 65 Neb. 308, affirmed on rehearing at page 315, makes it clear that the trial court erred in sustaining the demurrer thereto.

The judgment of the trial court is set aside and the cause remanded.

REVERSED.

IN RE ESTATE OF CHARLES STRELOW.
FRANK C. SCHULTZ ET AL., PROPONENTS, APPELLANTS, V. ROBERT STRELOW ET AL., CONTESTANTS, APPELLEES.

FILED JUNE 13, 1928. No. 25662.

1. **Wills: PROBATE.** By will A. bequeaths all his property without limitation to his brother B. as sole legatee, and nominates such brother as executor thereof, which will is without a revoking clause. B. dies without issue before the death of A. *Held*, that under section 1269, Comp. St. 1922, upon B.'s death the will lapsed, and was without force or effect; further, that on the death of A. such will was not entitled to probate.
2. ———: ———: **BURDEN OF PROOF.** A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, and that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise.
3. ———: **STATUTORY PROVISION: ISSUE.** The word "issue," as used in section 1269, Comp. St. 1922, means offspring of the named legatee or devisee, issue of his body, and lineal descendants of such offspring. Further, where such issue take under a will, they do so as substituted legatees or devisees, and not as heirs.
4. ———: **LAPSED WILL.** Record examined, and found that the trial court committed reversible error in permitting consideration by the jury of the 1909 will and the evidence relating thereto, either separately or in conjunction with their consideration of the 1925 will; also erred in submitting instruction 17 given on its own motion.
5. ———: **PROBATE: REMARKS OF JUDGE.** In an action for the probate of a will, where a physician is being examined as to the competency of the testator, a remark made by the trial judge, that "I think you are telling the truth, Doctor, I understand that. Be patient and answer the questions as nearly as possible"—is without the province of the court, and is erroneous and prejudicial.
6. **Attorney and Client.** It is an inherent duty devolving upon the courts to support the ethical standing of the bar by impressing upon its members the duty of holding as sacred that confidence which should and must ever exist between attorney and client.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Wilmer B. Comstock and *M. L. Poteet*, for appellants.

Meier & Meier, Robert R. Hastings and *Henry J. Beal, Jr., contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

THOMPSON, J.

This is an appeal had from a judgment entered on a verdict returned by the jury in the district court for Lancaster county, denying probate to an instrument claimed by proponents, appellants herein, to be the last will and testament of Charles Strelow, late of such county, dated December 30, 1925, and allowing probate to a purported will of such Strelow of the date of July 13, 1909, presented by the contestants, appellees herein.

The judgment of the trial court is challenged by way of numerous claimed errors presented by the motion for new trial, by the briefs and motions filed in this court, and by the argument in open court. However, from a review of the entire record, we have concluded to give consideration to but four thereof, to wit: (a) Did the trial court err in overruling the motion of proponents to strike from contestants' answer that part thereof relating to the 1909 will, or in admitting evidence respecting the same, or in granting the probate thereof? (b) If error was thus committed, were proponents thereby denied a fair trial as to the 1925 will? (c) Did the trial court err in giving instruction 17 on its own motion? (d) Did the trial judge commit reversible error by his statement, in the presence and hearing of the jury, that he believed the testimony of one of contestants' witnesses, upon a disputed point, to be true?

In our consideration of these errors, it becomes necessary to set forth some explanatory facts evidenced by the record. Charles Strelow and Theodore Strelow were bache-

lor brothers who became individually owners in fee of certain adjoining lands in Lancaster county, which they respectively farmed and received the usufruct thereof. They were hard-workers, and frugal. They lived and strove for each other. On July 13, 1909, each executed his last will and testament, in due and legal form, by means of which the one became the sole legatee of the other. The will of Charles, so far as material for our consideration, is as follows:

"First. I give, devise and bequeath to my brother, Theodore Strelow, all the property, real and personal, * * * which I may own or possess * * * at my death. Second. I hereby appoint my brother, the said Theodore Strelow, the executor of this my last will and testament, and request that no bond be required of him as executor."

Theodore's will was the same as that of Charles, except the names of the testator and legatee were reversed. These wills were then by them deposited with the county judge of such county for safe-keeping. Theodore died on November 5, 1925, never having been married, his father, mother, brothers and sisters having each and all preceded him in death, save his brother Charles. On November 27, 1925, one Robert R. Hastings was appointed guardian of the person of Charles Strelow, and the First Trust Company, a corporation of Lincoln, was appointed guardian of his property (as said in the briefs, owing to his extreme old age—80 or 81 years). On December 30, 1925, Charles Strelow executed, in due and legal form, the will in controversy herein, which, so far as material, provides in substance as follows: The first paragraph contains the usual direction authorizing the executor to pay the funeral expenses, debts, etc., out of his personal property. The second devises to the children of his sister Rike the sum of $5,000, to be divided share and share alike. In the third he states that he has not forgotten, nor been unmindful of, other children of certain of his brothers and sisters, but that it is his will and intention that they do not take or have any of his estate. The fourth is as follows:

"I give devise and bequeath to Albert L. Schultz, Henry F. A. Schultz and Frank C. Schultz, the sons of my old friend and neighbor Albert Schultz, the rest, remainder and residue of my property, both real and personal of every kind and nature wherever situated possessed by me at my death share and share alike."

In the fifth he appoints the last above named legatees (appellants herein) as his executors, and revokes all former wills by him made. On January 21, 1926, Charles died, never having been married, the death of his father, mother, and all brothers and sisters having preceded his demise. There were left surviving the nephews and nieces (contestants of the 1925 will and proponents of the 1909 will), together with the nephews and nieces named as legatees in the 1925 will, but no other kin. Shortly after the death of Charles, the above named Schultzes, legatees and suggested executors, jointly applied to the county court to have such will admitted to probate, the petition being in usual form. To this application objections were filed by appellees herein, being all of the other nephews and nieces of such Charles Strelow except those named as legatees in the 1925 will, a synopsis of such objections being in substance: That the testator, Charles Strelow, was at the date of the execution of the will 82 years and some months old; that he was not possessed of a sound and disposing mind, and was without testamentary capacity; that he had been adjudged to be senile by the commissioners of insanity of such county, and was at the time of the execution of the will under guardianship, having been found incompetent to care for himself or his property; that the contesting nephews and nieces were his next of kin (Theodore Strelow, the legatee named in the 1909 will, having died prior to the death of Charles); that such purported will of 1925 was obtained through the exercise of undue influence exerted over him by one O. B. Clark and the proponents Schultz; that the true last will and testament of such Charles Strelow, deceased, was made in the year 1909 (being the will of that date hereinbefore referred to); and objectors then, in the

usual form of a petition praying for probate of a will, offered such 1909 will for probate, and prayed that the 1925 will be disallowed. The case came on for hearing February 10, 1926, on the petition of the legatees Schultz, evidence was taken, and judgment entered denying probate of such 1925 will, and as to it the case was dismissed. The case was then adjourned as to the will dated July 13, 1909, and on February 24, 1926, judgment was entered admitting to probate as the last will and testament of said deceased the 1909 will, and granting the administration of the estate to the First Trust Company of Lincoln as administrator with will annexed; to all of which the Schultzes excepted. From the judgment disallowing the 1925 will probate, the Schultzes appealed to the district court for Lancaster county, which appeal was docketed as case number 92-115; and they also appealed from the judgment granting probate to the will of 1909, which appeal was docketed as case number 92-151. After the two cases were thus docketed, and the petition of the Schultzes, in usual form, was filed in case 92-115 praying for the probate of the 1925 will, the nephews and nieces interposed a motion in which the court was asked to consolidate case 92-151 with case 92-115, which motion, after due consideration, was overruled. On the same day an answer was filed by the contestants, similar if not identical with that filed in the county court, and, as in the county court, prayed that the 1925 will be denied probate, and the 1909 will be admitted to probate. The case was then called for trial to a jury, and the proponents of the 1925 will interposed a motion at the trial to strike from the answer of contestants the second clause thereof, to wit, all that part referring to and asking probate of the 1909 will, for the reason, in substance, that the same was redundant, immaterial, and under the record incompetent for any purpose. This motion was overruled, and in the further progress of the trial the nephews and nieces (proponents of the 1909 will), over the objections of the proponents of the 1925 will, were permitted to prove the due execution of the 1909 will, and to introduce it in evidence.

During the trial Dr. Zimmerer was sworn and examined on the part of these contestants as to the competency of Charles Strelow to excute the 1925 will. On direct examination the doctor had detailed at much length the mental and physical condition of such Strelow at the time and before the 1925 will was executed, and was being cross-examined by the attorney for the Schultzes in reference thereto, and was by such attorney asked the following question: "Well, how much like that, how near are you going to stick to what you said in direct examination and how much are you going to change it?" To which he answered: "Your Honor, I am trying to tell the truth as near as I can, and I haven't got any transcript of everything I said in the last six months." Thereupon the trial judge remarked: "I think you are telling the truth, Doctor, I understand that. Be patient and answer the questions as nearly as possible."

Considering first challenge (a): Did the trial court err in overruling the motion of proponents to strike from contestants' answer that part thereof relating to the 1909 will, or in admitting evidence respecting the same, or in granting probate thereof? As we have seen, these Strelow brothers remained single during their natural lives; that as to Theodore, his parents, brothers (except Charles), and sisters had each and all preceded him in death; that those nearest related to Theodore by blood at the time of his death, other than his brother Charles, were the contestants, nephews and nieces, and those nephews and nieces designated as legatees in the 1925 will (executed at a date subsequent to the death of Theodore). It has been seen further that the provisions of what we have referred to as the 1909 will of Charles limit the bequest as well as the suggested executor to Theodore Strelow. Thus, we must determine what effect the death of Theodore, sole legatee and devisee named in the 1909 will, had on such instrument. Did it, under the facts disclosed, lapse, or did it remain in full force? The right of one who owns property, either real or personal, to dispose of the same by will, is a limited right, created and controlled by legislative enactment, as

is the right of one to take and hold under and by virtue of such will. Hence, a legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, and that he as such legatee or devisee, under the law as well as under the will, is entitled to the legacy or devise. These burdens as to the 1909 will are imposed upon the appellees herein, and must be by them met. It may be admitted (but not determined), for the sake of our present consideration, that at the time of the execution of this instrument Charles Strelow was possessed of every legal qualification necessary to excute the same, and that it was, up to the time of the death of Theodore Strelow, his last will and testament; and that, if Theodore had outlived Charles, he would have become the sole legatee and devisee of his brother's estate. But, as we have seen, Theodore was first to die. This situation is met by section 1269, Comp. St. 1922, which provides:

"When a devise or any legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

The purpose of this section is to prevent the lapsing of the legacy covered by the will in case of the death of a legatee who is a "child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue." Thus, such issue take as substituted legatees or devisees, and not as heirs. The legal meaning of the word "issue" as in this section used, considered in connection with the other provisions of the chapter of which this section forms a part, is controlling. At common law the death of a specifically named legatee or devisee prior to that of the testator caused the legacy to lapse. To prevent a general application of this rule, as we construe this chapter,

the legislative body was impelled to include in such chapter the section in question, thus removing from the operation of such rule a devise or legacy to a child or other relation of the testator, who dies before the testator and leaves issue. It will be further noticed that the devise must be made to a child or other relative, thus requiring the testator to select the child or relative and so indicate by his will the person to whom the word "issue" is to attach. The foregoing constrains us to conclude that the legislative intent and purpose can best be conserved by our holding that the word "issue," as used in the section of the statute under consideration, means offspring of the named legatee or devisee, issue of his body, and lineal descendants of such offspring. Applying the law as thus determined to the facts in this case, it is shown by contestants' pleading, as well as by the bill of exceptions, that Theodore died without issue, that he was the sole legatee and suggested executor named in the 1909 will, and that such will did not contain a clause revoking any former will. Therefore, by reason of the death of Theodore Strelow, the 1909 will was bereft of its every intended usefulness, and by its own terms had finished its purpose, had lapsed, and was without force or effect. Hence, that part of contestants' pleading referring thereto did not present an issue, was redundant and immaterial matter, and proponents' motion to strike the same, and the objections to the introduction of evidence in regard to such will, as well as the objection to the introduction of the instrument itself, should each and all have been sustained, and prejudicial error was committed by the trial court in not so ruling.

Having thus determined, we will state as to challenges (b) and (c), that the sinister influence of this incompetent evidence regarding the 1909 will on the jury, in its consideration of the issues which were presented by proponents' petition praying probate of the 1925 will, and the answer of contestants deleted of that part thereof directed to the 1909 will, must have been of such potency as to deny to proponents of the 1925 will a fair trial. Therefore, the

trial court committed reversible error in permitting consideration by the jury of the 1909 will, and the evidence relating thereto, either separately or in conjunction with their consideration of the 1925 will. It follows that, under this record, the jury should not have been permitted to consider other than the 1925 will, hence instruction 17 was not pertinent to the issues, and was prejudicial.

Considering now challenge (d): Did the trial court commit prejudicial error in making the statement heretofore quoted respecting the testimony of Dr. Zimmerer? As to this, it is sufficient to say that under our practice the jury are the sole judges of the credibility of the witnesses, and the weight to be given their testimony. Hence, it is our conclusion that such remark made by the trial judge was without the province of the court, and was erroneous and prejudicial. *Edwards v. Cedar Rapids*, 138 Ia. 421. In 2 Hyatt, Trials, sec. 1051, the rule is thus succinctly stated:

"The trial judge should scrupulously refrain from remarks or conduct tending or calculated to influence the minds of the jury. This is due to the parties as well as the jurors. The function of the jury is to determine the truth of the controverted issues from the competent evidence produced in their hearing, and the law as given them by the court, and that function should be kept before them from the beginning to the end of the trial, and there should be no departure from this standard by the court in any manner whatsoever; by remarks touching the management of the case by counsel, and reflecting upon their conduct in such management or otherwise; or upon the character of a witness, or the weight and credibility of their testimony."

Our attention has been called to a claimed error involving the question: Was it legal and ethical for an attorney of contestants (nephews and nieces) to appear as such, or to testify to other than formal matters in their behalf at the trial, under the facts disclosed? This challenge was not presented to the trial court, and neither was it presented in the briefs or motions filed in this court, and was

not called to our attention until at the oral argument. Thus, the question is not before us for determination. However, as to such challenge it might be well to state: The testimony of this witness given at the trial covers 86 pages of the bill of exceptions, details of which need not be given, further than to say that they embrace a disclosure of the acts and confidential relations and conversations had by and between Charles Strelow as client and such witness as his attorney. This relationship, the record shows, existed uninterruptedly from the 10th day of November, 1925, to the 15th day of December of that year, and, as detailed in evidence, served as a forceful factor in the consideration by court and jury of the mental capacity of Strelow to execute the will of December 30, 1925, as well as his mental and physical ability to resist the undue influence of designing persons, if such there were, in the making of said will. It is elementary that one desiring our consideration of claimed errors of the trial court must first have presented the same to such inferior tribunal. However, notwithstanding this rule, it is equally elementary that it is an inherent duty devolving upon this, as well as the *nisi prius*, court to support the ethical standing of the bar by impressing upon its members the duty of holding as sacred that confidence which should and must ever exist between attorney and client. Hence, as this case may be tried again, attention is called to section 8835, Comp. St. 1922, and *In re Estate of Bayer*, 116 Neb. 670. Also, see opinion in *Fitzsimmons v. State*, 116 Neb. 440.

The other claimed errors are not likely to again occur if a retrial is had, hence, owing to the length of this opinion, they are left undetermined.

The judgment of the trial court is reversed in its entirety, and the cause remanded for further proceedings in harmony with the opinion.

REVERSED.

LEROY STOHLMAN, APPELLEE, V. B. B. DAVIS, APPELLANT.

FILED JUNE 13, 1928. No. 25258.

1. **Physicians and Surgeons**: NEGLIGENCE. A physician or surgeon undertaking the treatment of a patient, and who fails in such treatment to exercise reasonable skill and care, or such skill and care as is ordinarily exercised by members of his profession in good standing, practicing in his or similar localities, is guilty of negligence.
2. ———: MALPRACTICE: TESTIMONY OF EXPERTS. In a malpractice case, it is not necesary to sustain the verdict for plaintiff that all expert witnesses called should consider the treatment pursued by the defendant improper; nor will the fact that all of such witnesses agree that a portion of such treatment is proper, under some circumstances, in itself defeat recovery.
3. **Trial**: EVIDENCE. Whenever there is evidence of so positive and significant a character as would support a verdict, if uncontradicted, it is the duty of the trial court to submit the case to the jury under proper instructions. It is not the function of the court to weigh the evidence for the purpose of saying how the verdict should go.
4. **Physicians and Surgeons**: NEGLIGENCE. A physician or surgeon who leaves or abandons his patient in a critical stage of disease, without reasonable notice to enable the patient to secure another medical attendant, when the giving of such notice is reasonably possible, is guilty of culpable dereliction of duty, and, if damages are occasioned thereby, is liable therefor.
5. **Evidence** examined, and *held* to support the verdict.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Hainer, Flansburg & Lee, and *Gurley, Fitch & West,* for appellant.

Wilmer B. Comstock and *Frampton & Polk, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

EBERLY, J.

This is an action by Leroy Stohlman against Doctor B. B. Davis and another for malpractice. The jury found for

plaintiff and against the defendant, B. B. Davis. The last named defendant appeals.

A brief summary of the facts developed at the trial is: The plaintiff, a youth of 18, was a sufferer of osteomyelitis. The seat of the trouble was in the right femur, a short distance above the knee. The onset of the disease first developed on November 10, 1923. He was taken from his farm home near Louisville, Nebraska, by his father, to the Clarkson hospital at Omaha, Nebraska, and there operated upon by Doctor B. B. Davis who had been employed to take charge of the case. The first operation occurred on November 12, 1923. On February 4, 1924, Doctor B. B. Davis performed a second operation at which time he removed a piece of the infected femur about four inches in length and one inch in width, stating that he had taken out all the bone he dared without incurring the danger of a fracture or a separation of the femur. No cast, splint or support was placed upon the leg after this operation until March 8, 1924, when a splint was applied, and on March 25, following, the leg was put in a cast.

During plaintiff's confinement in the hospital the weakened femur separated. The exact date of this occurrence is not fixed beyond dispute in the evidence. From plaintiff's testimony it may be inferred that it took place soon after the operation of February 4 while the limb was still without support of splint or cast, and that it remained in this condition without attention until March 8.

Doctor Lord, who appears in the case as a witness for the defendant and who was present and assisted in the operation on plaintiff's foot on March 8, testified, in substance, that he was called into the case by plaintiff's father; that in company with Doctor Herbert Davis he made an examination of plaintiff's foot on March 7; that, notwithstanding the existence of natural drainage, "some pus was retained;" that "the parts fluctuated;" that the conclusion arrived at in consultation between the two doctors that "drainage should be had immediately" was evidenced by the fact that "arrangements were made to attend to it the

next morning, March 8;" that at this operation on plaintiff's foot on March 8, it was developed that osteomyelitis, apparently originally seated in the metatarsal bone, had extended to other bones in the foot; that, in his opinion, there was osteomyelitis in the metatarsal bone for a considerable period prior to the time of the operation; that the exact extent of time during which this condition obtained would be impossible to state; neither would the doctor state that, had the operation of March 8 been performed a week earlier, the plaintiff might not have had an absolutely normal ankle.

It appears from the evidence that Doctor Lord did not discover the separation of the femur at the time of the operation on the foot on March 8. Later, it appears that he informed Stohlman's father that the femur had separated, and the record sustains the conclusion that at this time the witness was of the opinion that the separation "might have occurred prior to the time he got on the case."

On or about February 20, 1924, Doctor B. B. Davis became ill. For the purpose of a thorough examination and treatment he went to Rochester, Minnesota, to consult Mayo brothers, eminent specialists of that place. He did not return to Omaha until February 26 following. At the time of his return from Rochester he remained in Omaha but a few hours when he continued on to Arizona where he remained for a little over a month recuperating under the advice of the physicians consulted. During the few hours in Omaha on February 26, he called on Stohlman at the hospital. There had been an X-ray plate made which was examined by him, and a consultation was also had with Doctor Herbert Davis in whose charge Stohlman had been placed by Doctor B. B. Davis. The conclusion of the consultation was that osteomyelitis was developed in the right foot; that there was infection in some of the bones thereof, but that, as drainage was apparently good and the temperature then normal, it was thought that no immediate operation was necessary.

Doctor B. B. Davis, at the time of leaving for Rochester,

Minnesota, as well as when leaving for Arizona, wholly failed to notify either the plaintiff or the plaintiff's father of his intended absence. Stohlman was taken over wholly without his own consent or the consent of his father by Doctor Herbert Davis, and without knowledge or notice that Doctor B. B. Davis, by reason of his enforced absence, had practically abandoned the case. In fact, Stohlman and his father were not advised of the situation or of the absence of Doctor B. B. Davis until about March 7, 1924, at which time Doctor Lord took over the case and whose treatment thereof is not in any manner criticized in the evidence. The plaintiff was not discharged from the hospital until May 15, 1924. At that time his right leg had been permanently shortened about an inch, and the right ankle and foot were and still are in a condition of permanent immovability.

The first appearance of the trouble in the right foot was on November 14, 1923. At that time at a point just above and a little to the right of the big toe, it became swollen, inflamed, and discolored. It was treated by local applications with a varying degree of success until March 8, 1924, when a surgical operation, performed by physicians other than defendant, was had which fully disclosed that the true nature of the trouble was osteomyelitis. Thereafter it appears that Stohlman's progress to recovery was regular and continuous.

The trial judge narrowly defined the issues upon which the case was submitted. Only the following questions, in specific and definite form, were submitted to the jury for determination: Whether the defendant was negligent in omitting to apply to the leg a cast, splint or other support to prevent a separation of the femur which the disease disintegrated and weakened, and after a portion thereof had been removed by operation. Whether the defendant was negligent in failing to diagnose the disease of the foot as osteomyelitis, and to provide proper drainage therefor on or prior to March 8, 1924. Whether the defendant was negligent in abandoning plaintiff at a critical period of

plaintiff's illness without proper notification of his necessary absence.

The high standing of the defendant as a surgeon is not questioned in this action. The possession by him of the degree of knowledge and skill requisite to practice his chosen profession is an admitted fact of the record before us; in fact, the record discloses without any contradiction whatever that the defendant is exceptionally well qualified and has long enjoyed an extensive practice in the field of his chosen profession—that of general surgery.

The question before us presents and involves no question, therefore, of qualifications of the defendant. The inquiry is strictly limited as to whether Doctor B. B. Davis, in treating Stohlman, exercised the ordinary care, skill and diligence which, in view of his undoubted qualifications, the law would require to be exercised on behalf of his patient.

It may also be said as a general rule, in determining what constitutes reasonable and ordinary care, skill and diligence, the test is that which physicians and surgeons in the same neighborhood and in similar communities, engaged in the same or similar lines of work, ordinarily exercise and devote to the benefit of their patients.

There is no fixed standard in law by which a court is enabled to arbitrarily say in every case involving a charge of malpractice what conduct shall be considered as an exercise of reasonable and ordinary care, skill and diligence, and what shall constitute ordinary care, diligence and skill under any and all circumstances. The terms, ordinary care, ordinary skill, ordinary diligence, and like expressions, as applied to the conduct of physicians and surgeons with reference to their patients, have a relative significance, and cannot be arbitrarily defined.

Triers of fact in cases wherein these questions are involved are necessarily dependent to a degree, at least, on witnesses versed in the sciences of medicine and surgery. When a given state of facts, submitted to the jury, is such that reasonable men may fairly differ on the question as to whether there was negligence or not, the determination

of the matter is for the jury, as triers of fact. It is only where the facts are such that all reasonable men must draw the reasonable conclusion from them that the question of negligence or, in substance, of ordinary care, ordinary skill, and ordinary diligence, is ever considered as one of law for the court. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408.

Considering the questions as submitted by the district court to the jury and in view of them, it may be said that the relations between physician and patient are personal and highly confidential, and on engaging a physician to treat his case a patient impliedly engages him to attend throughout that ailment, or until his services are dispensed with. The patient places himself in the hands of the physician and surgeon and thereafter relies upon the judgment or knowledge of the physician or surgeon in question. When a surgeon performs an operation, not only must he use reasonable care and skill in its performance, but also, in subsequent treatment of the case, it is his duty to give the patient such attention after operation as the necessities of the case demand, in the absence of any special agreement limiting the service or reasonable notice to the patient.

It is also to be remembered in this connection that the facts in the record disclose that the defendant, by his excellent preparation and for thirty odd years of successful practice, had acquired peculiar qualifications and special knowledge on the subject of surgery. In short, his employment by the plaintiff was, in fact, if not in name, the employment of a specialist or an expert in surgery. It would seem, in view of the nature of his employment and the circumstances and conditions of his patient, as shown by the record in this case, that to substitute for himself another physician of but three or four years' experience in the practice without any notice to, or agreement with, the patient involved or those representing him, would be not only a clear violation of duty but, in effect, to utterly abandon the case.

We do not overlook the fact that the doctor was ill; that

his physical condition prevented the rendition of further services. But his physical condition did not interfere with or prohibit the giving of due and ample notice of his disability to his patient or to his patient's father. The clear duty, under the circumstances, was imposed upon him either to secure the patient's acceptance of the substitution of his son, Doctor Herbert Davis, or to give him notice so as to secure another physician or surgeon of his own choice.

In view of the situation that existed at that time, and the manifest failure of the defendant to discharge his full duty imposed by the circumstances, we certainly approve the instructions given by the trial court which were substantially in accord with the conclusion stated.

The record contains ample evidence which, if believed, sustains the conclusion that, at the time the defendant herein left Nebraska for Arizona, the plaintiff was in a critical condition.

The undoubted rule applicable to the situation is that "a physician who leaves a patient in a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty, and is liable therefor." 30 Cyc. 1576. See, also, *Burnett v. Layman*, 133 Tenn. 323.

On the question of whether the defendant was negligent in omitting to apply to the injured leg a cast or splint or some other support to prevent a separation of the weakened femur after the operation upon it, and as to whether the means taken by the defendant in treating and providing drainage for the infected foot, under the circumstances disclosed by the evidence, were in accord with the mode established and followed by his school of practice for the treatment of such cases, that is, in accord with good practice, and as to the nature of the results occasioned thereby, the evidence is certainly conflicting. The conflict is decidedly emphasized in the expert testimony introduced by the respective parties. But, as to the latter feature, this court is committed to the doctrine:

"In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper, under some circumstances, in itself defeat a recovery." *Hewitt v. Eisenbart*, 36 Neb. 794.

There can be no question but what, under the evidence in the record before us for examination in this case, reasonable men may draw different conclusions on the controlling issues involved herein. But, it fairly appears that this record contains evidence positive and significant in character which, uncontradicted, would support a verdict for the plaintiff. This being true, the fact that it was decisively and fully contradicted by the witnesses for the defendant does not militate against the force and effect and conclusiveness of the decision of the triers of fact in this case on the points then in dispute.

It is to be remembered that the jury to whom these matters were submitted under proper instruction by the district court, under our system, are the sole judges of the credibility of the witnesses and the weight given to their testimony. In this manner and on this basis only may the constitutional right of trial by jury be accorded litigants.

We are indeed committed to the doctrine that it is elementary that, in a jury trial, when different minds may reasonably reach different conclusions from a given statement of facts as to whether negligence has been established, the question of negligence is for the jury. *Casey v. Ford Motor Co.*, 108 Neb. 352.

The same principle applies to the evidence upon which the amount of damages was determined. While it is conflicting, and while triers of fact might have been justified, if certain evidence was to be believed, to have found against the plaintiff, yet their verdict discloses that other witnesses were accepted and other testimony believed which conflicted with the first evidence referred to.

In brief, it may be said that the questions presented in this case, and which are controlling in its determination, are wholly dependent upon the credibility of witnesses and the weight of testimony. It is thus to be determined as a question of fact. It was so determined by the jury against the contentions of the defendant. We do not find that the verdict is unsupported by the evidence.

It therefore follows that the judgment of the district court must be deemed right, and the same is

AFFIRMED.

GOSS, C. J., took no part in the decision.

O. M. CAMPBELL COMPANY, APPELLANT, V. BOYD COUNTY ET AL., APPELLEES.

FILED JUNE 13, 1928. No. 25978.

1. **Counties**: CLAIMS: APPEAL BY TAXPAYERS. An appeal by taxpayers lies to the district court from an order of the board of county supervisors allowing a claim against the county, although such action on the part of the board may be the result of a compromise over a disputed claim.
2. ———: ———: ———: TRIAL DE NOVO. An appeal from an order of the board of county supervisors allowing a claim brings the action to the district court for trial *de novo*.
3. **Record** examined, and *held* to sustain the action of the trial court in directing a verdict for the defendants.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Sterling F. Mutz, for appellant.

W. T. Wills and *J. A. Donohoe, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

PROUDFIT, District Judge.

This action originated in a proceeding before the board of county supervisors of Boyd county wherein a claim was

allowed by the said board for $2,548 against said county in favor of O. M. Campbell Company, appellant herein.

Certain taxpayers of the county appealed from the order allowing said claim to the district court of said county. Pleadings were duly made up and the cause tried to a jury. At the close of plaintiff's case in chief, the defendant county moved for a directed verdict. Said motion was sustained and the jury directed to return a verdict for the defendants (appellees herein), and such verdict was returned and filed, and motion for new trial overruled and judgment entered for defendants, from which order overruling the motion for new trial and judgment, plaintiff prosecutes an appeal to this court.

The appellant appears to rely on two general propositions for a reversal of the action of the trial court, namely: (1) The compromise entered into between appellant and the supervisors of Boyd county was a ministerial act in its nature and not subject to review on appeal; (2) the supervisors having entered into the compromise in behalf of the county with appellant, the county was bound thereby and the taxpayers had no greater right to repudiate the compromise than the county itself or its board of supervisors.

Other propositions are discussed in appellant's brief, but, not being material to a decision of the cause, no good purpose would be served by alluding to or discussing them.

To support his two general propositions, appellant cites as authority the cases of *Lancaster County v. Lincoln Auditorium Ass'n*, 87 Neb. 87, *Gage County v. King Bridge Co.*, 58 Neb. 827, and *Green & Van Duyn v. Lancaster County*, 61 Neb. 473. The disposition of these cases was based upon a marked difference in the facts that plainly distinguishes them from the case at bar. It would prolong this opinion unnecessarily to point out the distinction in the cases cited, and so reference is merely made to that fact.

As to the right of the taxpayers to appeal from the action of the board of county supervisors, it is only necessary to refer to section 866, Comp. St. 1922, which provides as follows: "Any taxpayer may likewise appeal from the

allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section." Appellant lays much stress on the fact that the amount allowed was by way of compromise of a pending claim, and that therefore this is not an attempt to appeal from an ordinary allowance of a claim. This argument is without merit. The action of the county board in allowing the claim of $2,548 was the exercise of judicial power on the part of the board, from which an appeal would lie to the district court. *Heald v. Polk County,* 46 Neb. 28. The action, being properly before the district court on appeal, was for trial *de novo,* and it was incumbent upon the appellant to establish all of the material allegations of its petition by a preponderance of the evidence. Section 867, Comp. St. 1922, provides that such appeal shall be tried and determined the same as appeals from justice courts; and section 9406 recites: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court."

In *Box Butte County v. Noleman,* 54 Neb. 239, it is held that an appeal from the order of the county board allowing a claim against the county brings the matter to the district court for trial *de novo,* and issues should be joined in the district court as in cases appealed from a justice of the peace.

The pleadings place the rendition of services and the amount due therefor directly in issue, and the burden was upon the appellant to establish the performance of the contract in accordance with the terms thereof and to show the amount due thereon.

The record discloses a total lack of competent evidence on these vital points, and the trial court did not err in directing a verdict for the defendant, and the judgment therein rendered should be affirmed.

AFFIRMED.

The following opinion on motion to clarify opinion was filed December 6, 1928. *Motion sustained.*

PER CURIAM.

This matter comes on upon a motion to clarify the opinion herein filed June 13, 1928. The motion will be sustained. The uncertainty arises from an incomplete statement of the pleadings. Two causes of action were originally stated in the petition: (1) Upon an agreement for a compromise and settlement of an account for services performed under a written contract; and (2) upon the contract itself for the services rendered.

Upon the opening of the trial in the district court, before any evidence taken, plaintiff dismissed his second cause of action without prejudice by leave of court, as appears from the bill of exceptions. The case was tried upon the first cause of action only. A verdict was directed for defendant, plaintiff appealed, and the judgment was affirmed. The only question presented to and decided by this court was the correctness of the order sustaining defendants' motion for a directed verdict. It follows that the order of affirmance only disposed of the first cause of action, and had no effect upon the claim for services under the contract.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. ORD STATE BANK: VALLEY COUNTY, CLAIMANT, APPELLEE: I. A. KIRK, RECEIVER, APPELLANT.

FILED JUNE 13, 1928. No. 26047.

1. **Banks and Banking**: INSOLVENCY: TAXES. State, county and municipal taxes are a first lien upon the assets of an insolvent state bank in the hands of a receiver, and claim therefor need not be filed as ordinary claims of creditors.
2. ———: ———: ———. It is the duty of such receiver to pay all valid taxes on the assets of the bank before any payment to depositors.
3. ———: ———: ———. Where there were sufficient assets of the bank to pay the taxes, but the same have been paid out

to depositors, or sold in the process of liquidation, the taxes may be ordered paid out of the depositors' guaranty fund.

4. Taxation: BANK STOCK. Section 1, class B, ch. 165, Laws 1925, in so far as it purports to authorize a levy of taxes upon the shares of stock of banks, loan and trust, and investment companies, in excess of five mills on the dollar valuation, violates the rule of uniformity as to class required by section 1, art. VIII of the Constitution of this state, and to that extent is invalid.

APPEAL from the district court for Valley county: EDWIN P. CLEMENTS, JUDGE. *Reversed, with directions.*

C. M. Skiles, Butler & James and *Edward L. Vogeltanz,* for appellant.

George A. Munn, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

REDICK, District Judge.

Appeal by the receiver of the Ord State Bank, insolvent, from the allowance of a claim for taxes ordered to be paid from the depositors' guaranty fund. The receiver was appointed September 24, 1926, and on that date took possession of all real and personal property and assets of the bank. On October 4, 1926, by an arrangement between the department of trade and commerce, the receiver and the State Bank, Ord, Nebraska, a newly organized banking corporation, all the assets of the insolvent were sold and conveyed to said State Bank, free from any liens or claims except such as were assumed by the vendee, and which were described as liabilities of deposits subject to check, cashier's checks and time certificates of deposit. The contract of sale was approved by the court and all the assets delivered to the vendee. October 27, 1926, an order was made in the receivership proceedings fixing December 1, 1926, as the last date for filing claims, and the 6th day of

December as the time for hearing claims. Notice of these orders was duly given by posting and publication in newspapers, and on December 6, 1926, the court entered an order barring all claims not theretofore filed.

On February 3, 1927, the county of Valley, appellee, filed a claim against the insolvent bank for the sum of $578.74, for personal taxes for the year 1926 levied upon the shares of stock of said bank, and alleging that said claimant had no notice whatever of the time fixed for filing claims or the time of hearing the same, or of the closing of said bank, in time to permit filing said claim before said dates, and praying for an order on the receiver to show cause why said taxes should not be paid. An order was thereupon issued as prayed, and the receiver filed his return to said order objecting to the allowance of said claim on the following grounds:

(1) That the court had no jurisdiction, after the order barring claims, to allow the same except upon compliance with certain conditions of the statute, which was not done.

(2) An answer to the merits of the claim, admitting the assessment of the taxes in question, that the receivership proceedings are still pending, and that all the assets were sold as alleged, but denying that they were sold free from any lien for taxes of Valley county; and alleging that the State Bank bought said property subject to said tax lien, which it should pay.

(3) That said taxes were invalid as to any amount in excess of $99.10, for reasons which will be referred to later on upon the discussion of this defense.

The county of Valley filed a demurrer to the return, objections to jurisdiction, and answer of the receiver, on the ground they do not state facts sufficient to constitute a legal defense to the tax claimed. The demurrer was sustained by the court, and the receiver refused to plead further, but elected to stand upon his demurrer. The claim was allowed and the receiver ordered to pay the same out of any funds in his hands, and, if they were insufficient, that the deficiency be paid out of the depositors' guaranty fund by

the department of trade and commerce of the state of Nebraska; to which order and judgment the receiver excepts and appeals to this court.

The first objection of the receiver is to the jurisdiction of the court to allow the claim and order its payment when the same had not been filed prior to the order barring all claims. By section 21, ch. 191, Laws 1923, it is made the duty of the receiver, within seven days after the order fixing the date for filing and hearing claims, to mail to each known creditor of such bank a notice of the time and place of hearing on claims by the court; and it was further provided that any claim not presented within the time fixed by such notice should be barred, "unless the court shall by order direct payment thereof thereafter, which order may be entered upon a showing, within six months from time fixed by such notice, that the creditor did not have knowledge of the closing of said bank within the time to permit filing of the claim before the date fixed by the court for hearing on claims."

Section 24 of said act provided: "The claims of depositors, for deposits, and claims of holders of exchange, shall have priority over all other claims, except federal, state, county and municipal taxes, and, subject to such taxes, shall at the time of the closing of a bank be a first lien on all the assets of the banking corporation from which they are due and thus under receivership, including the liability of stockholders, and, upon proof thereof, they shall be paid immediately out of the available cash in the hands of the receiver." It was then provided that, if the funds were insufficient to pay the claims of depositors and holders of exchange, the court should determine the amount of the deficiency and certify the same to the department of trade and commerce, which should cause the same to be paid from the depositors' guaranty fund. The receiver reported to the court that there were no known creditors, and no notices were mailed as provided by the statute. It seems clear that, before the claim of a creditor would become barred by the statute, it should appear that the no-

tices required to be given by the statute had been mailed; but we think that the county was not a creditor, within the meaning of the statute, to whom notice was required to be mailed, for two reasons:

(1) The term "creditor" is defined by Webster as "one who gives credit in business matters; hence, one to whom money is due;" and in ordinary acceptation has reference to financial or business transactions. It is in this sense that the term is used in the statute.

(2) By express provision of the statute, claims for taxes are made prior liens upon the assets of the bank in the hands of the receiver, and it was his duty to pay them before paying the depositors.

Taxes are matter of public record, and it has been held in analogous cases that for that reason it is not necessary that they should be filed or proved as a claim against the estate. *In re Prince & Walter,* 131 Fed. 546, a proceeding in bankruptcy. And in estate proceedings it is said: "The more general view is that the requirement of presentation does not apply to claims for taxes and assessments, whether assessed before or after the death of decedent." 24 C. J. 325, sec. 946. Our attention is called by appellant to the case of *Midland Guaranty & Trust Co. v. Douglas County,* 217 Fed. 358, as holding that it is the duty of the county to present a claim for taxes in the receivership proceedings the same as any other claimant, but the case goes no further than to hold that it was proper for the county to appear in the receivership case and ask for an order for the payment of the taxes substantially as was done in the present case. The case cited *Millett v. Early,* 16 Neb. 266, which also held merely that it was proper for the county to file a claim in estate proceedings. In this connection it may further be observed that section 5996, Comp. St. 1922, provides:

"No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

We are of the opinion that for the reasons above noted,

and the receivership proceedings being still pending, the court had jurisdiction to order the payment of the taxes.

The second objection of the receiver is that the assets were sold to the State Bank subject to the lien of the taxes. This was not in accordance with the terms of the contract whereby the State Bank assumed only liabilities for deposits subject to check, cashier's checks and time certificates of deposit. Furthermore, the taxes in question did not become a lien upon the assets of the Ord State Bank until November 1, 1926, and, therefore, as between the seller and the purchaser, the latter would take the property free of the lien in the absence of a contract to the contrary.

The third objection of the receiver that the taxes are invalid presents a more serious question. It is based upon the propositions: (1) That the same are unconstitutional as in violation of section 5219, Rev. St. U. S. (1878); and (2) that they are unconstitutional as violating the rule of uniformity required by section 1, art. VIII of the Constitution of Nebraska. Of these in their order:

By sections 5884-5889, Comp. St. 1922, provision is made for the taxation of intangible property, which it defines as including corporation shares or stocks, and for the manner of their assessment. Section 5884 provides that intangible property shall be separately listed and taxed on the basis of 25 per cent. of the mill rate levied upon tangible property. By section 5887 special provision is made for the return by banks and loan and trust or investment companies of the number of shares comprising their capital stock and the value of the shares on the 1st day of April, to be delivered to the county assessor. It is then provided: "Such capital stock shall thereupon be listed and assessed by him (county assessor) at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located." It will be noted that by this statute shares of stock in the hands of individuals, corporations and all other property owners, except banks and loan and trust or investment companies, were assessed at 25 per cent. of the

rate of taxation upon tangible property, while the same class of property, shares of stock of banks, loan and trust, or investment companies, was taxed at the full rate of taxation on tangible property. In *Merchants Nat. Bank v. City of Richmond,* 256 U. S. 635, it was decided that a statute and ordinance taxing national bank stocks at a greater rate than that levied upon intangible personal property in general were invalid as contravening section 5219, Rev. St. U. S. (1878) which provided that state taxation of shares in national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." Following the decision of that case, in *State Bank v. Endres,* 109 Neb. 753, we held that, if national banks were to be excluded from the operation of section 5887, state banks would also have to be excluded, because otherwise the taxes levied thereunder would lack the uniformity as to class required by section 1, art. VIII of the Constitution of Nebraska. That case was cited with approval in *Central Nat. Bank v. Sutherland,* 113 Neb. 126.

In 1925 section 5884, defining intangibles, and section 5887, were repealed by the legislature (Laws 1925, ch. 165) and intangibles were divided into two classes: Class A consisting of money, United States legal tender notes and other securities of the United States payable on demand, savings accounts, all bank deposits, bills of exchange, checks and drafts, to be taxed at 2½ mills on the dollar of the actual value thereof. Class B to include all other kinds of intangible property named in the section which is not included in class A, among which are included corporation shares or stocks, and providing that all intangible property in class B should be taxed at the rate of 5 mills on the dollar of the actual value thereof. It was further provided that the shares of stock in banks and loan and trust or investment companies should be "listed and assessed" by the county assessor "as intangible property at 70 per cent. of the mill rate at which tangible property is assessed in the taxing district where the principal place of business of such

association, bank or company is located." Is the act of 1925 in violation of section 5219, Rev. St. U. S. (1878) and section 1, article VIII of the Constitution of this state? We are not concerned in the case before us whether or not the act is invalid as applied to national banks, and we will, therefore, confine ourselves to the question whether it violates the state Constitution. It will be observed that the act first provides for the taxation of corporation shares or stock at 5 mills upon its actual value, and then provides that the shares of stock of banks and loan and trust or investment companies shall be "listed and assessed" at 70 per cent. of the mill rate at which tangible property is assessed. If by this language the legislature intended that the capital stock or shares of banks should be taxed at a rate equal to 70 per cent. of the taxes levied upon tangible property, then a different rate of taxation is provided for the same class of property, as related to banks, from that levied against the shares of stock of other corporations, and is equally in violation of the constitutional requirement of uniformity as to class. It may happen that 70 per cent. of the rate of taxation upon tangible property will be precisely 5 mills upon the dollar, in which event no harm would be done, but the probability of such an event is ephemeral, and is purely a matter of chance. If the application of the 70 per cent. rate should exceed 5 mills upon the dollar of valuation, or be less than 5 mills, in either event the rule of uniformity would be violated. In the instant case the application of the 70 per cent. rate resulted in the taxation of the shares in question at the rate of 29.2 mills whereas the rate of assessment was 5 mills on all other corporate stock or shares except banks, loan and trust, or investment companies. We are unable to perceive that the defects of the statute of 1922 have been remedied by the act of 1925, and are constrained to hold that the last named act is unconstitutional for the same reasons for which the former was held invalid.

The taxes equitably due upon the shares of stock of the Ord State Bank at the rate of 5 mills upon the dollar of

the actual valuation as assessed is the sum of $99.10, as to which no complaint of invalidity is made; but it is contended by the receiver that no part of the taxes in question is a charge upon the depositors' guaranty fund. In *Farmers State Bank v. Nelson,* 116 Neb. 541, we held: "It is the duty of the guaranty fund commission lawfully in control of a state bank, out of the assets thereof, to pay taxes lawfully levied upon the intangible property of such bank as a demand having priority to rights of the depositors and creditors it represents."

The taxes in question, so far as valid, are a lien upon the assets of the bank in the hands of the receiver, and it was his duty to pay them. Instead of paying them, and before any opportunity for filing claims against the bank was presented, the receiver, with the consent and approval of the court and the department of trade and commerce, sold and delivered all of the assets of the Ord State Bank to the State Bank of Ord, leaving nothing in his hands with which these taxes could be paid. In *State v. American State Bank,* 114 Neb. 740, we held that, where assets of the bank sufficient to pay taxes were in the hands of the receiver and were used for the payment of depositors, it was not error for the court to order the taxes paid from the guaranty fund. This case was cited with approval and followed in *Farmers State Bank v. Nelson, supra.* It does not appear from the record in this case what was the value of the assets of the Ord State Bank which came into the hands of the receiver; but it is conceded that all of its assets, real and personal, were turned over to the receiver and sold to the State Bank. Under these circumstances, in the absence of any allegation that the assets so received were insufficient to pay the taxes, we are entitled to assume that they were so sufficient.

We conclude that the district court erred in sustaining the demurrer to the return and answer of the receiver; that the taxes in question in excess of $99.10 are invalid and not a lien upon the assets of this bank; that the remainder of said taxes, $99.10, with interest at 10 per cent. from

December 1, 1926, were a valid lien upon the assets of the bank, and that, in the absence of sufficient assets remaining in the hands of the receiver to pay the same, they were a charge upon the depositors guaranty fund.

It is therefore ordered that the judgment of the district court be reversed and proceedings remanded, with instructions to enter judgment in favor of the claimant for $99.10, with interest at 10 per cent. from December 1, 1926, and order the same paid out of the depositors' guaranty fund.

REVERSED.

GEORGIA PRIEST, APPELLANT, V. BUSINESS MEN'S PROTECTIVE ASSOCIATION, APPELLEE.

FILED JUNE 13, 1928. No. 26105.

1. **Witnesses**: REPRESENTATIVE OF DECEASED. One entitled to present claim for compensation for the death of an employee under the workmen's compensation act is the representative of a deceased person.

2. ———: COMPETENCY: TRANSACTIONS WITH DECEASED. In a proceeding for compensation for the death of an employee under the workmen's compensation act, the officers and directors of a mutual assessment association, members thereof, have a direct legal interest in the result, and are incompetent to testify as to any transaction or conversation had between the witness and the deceased person against the legal representative of the latter.

3. ———: ———: ———. Transactions in which a deceased person took part are not of themselves incompetent, but evidence thereof may be given by persons not disqualified by statute.

4. ———: EVIDENCE: LETTERS WRITTEN BY DECEASED. A letter proved by competent evidence to have been written by deceased is competent evidence, in a proper case, to prove an admission, or for any other proper purpose, though the adverse party is the representative of deceased.

5. **Master and Servant**: WORKMEN'S COMPENSATION ACT: INDEPENDENT CONTRACTOR. Evidence examined, and *held* sufficient to sustain the finding of the district court that deceased was an independent contractor, and not an employee entitled to compensation under the workmen's compensation act.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Allen & Requartte, for appellant.

Good, Richardson & Good, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a proceeding under the workmen's compensation act to recover compensation for the death of Barney B. Priest, initiated by his wife, Georgia Priest. The claimant will be referred to as the plaintiff, and the employer as the defendant. Compensation was allowed by the commissioner at $15 a week for 350 weeks, and defendant appealed to the district court, where the award was set aside and judgment entered in favor of defendant. Plaintiff appeals to this court.

The plaintiff claims and alleges that the deceased, who was her husband, was an employee of defendant and died as the result of an accident arising out of and in the course of such employment, on March 15, 1926.

The defendant denies these allegations, and claims and alleges that at the time of his death said Barney B. Priest was manager for defendant of the state of South Dakota and was an independent contractor.

It will be necessary to state somewhat in detail the facts as disclosed by the record and about which there is not much dispute, but as to the proper inferences to be drawn from those facts the parties are in wide disagreement. From the evidence offered by plaintiff it appears that Priest first became connected with defendant about May 1, 1924, the nature of which connection being evidenced by a contract in writing excuted a few months later. The contract appointed Priest as "special agent to solicit desirable risks for health and accident insurance" for the association. Certain commissions were provided, together with bonus

commission of 50 cents per application. The contract then provided:

"It is further agreed that the party of the first part agrees to give the party of the second part an opportunity to take charge and become state manager of the first state opened after July 1, 1925, and commission and consideration for handling said state to be agreed upon after the party of the first part becomes admitted. In the event the party of the second part does not want to take charge of the first state opened it is further agreed that he shall have the first privilege of any state opened so long as this contract is in force and effect, until he gets a state that is desirous to him.

"It is further agreed that party of the first part will pay party of the second part one hundred dollars per month flat as traveling expenses so long as he remains with the association.

"The party of the second part shall have authority to appoint his agents to work under him for the party of the first part, and shall receive as an overwriting commission the difference between the commission paid the subagent and the commission stated in this contract."

The contract then provided that, in case the association was converted into a stock company, Priest should receive $5,000 of stock, and contained a provision for cancelation by either party upon 60 days' written notice, and a provision that Priest was to remit in cash all nets to the association with the applications.

July 5, 1924, defendant wrote Priest a letter insisting upon his putting in all his time for the company, at least eight hours a day, and forbidding him to sell any other kind of insurance or represent any other company.

Witness O'Sullivan, secretary of the company, testified as to the relations of the parties and the manner of conducting the business during a period ending January 5, 1925, when the witness left the employ of the company. His testimony was to the effect that Priest was under the control of the company, who designated the places where

he was to go and the work he was to do, and that he was under the direction of the office at all times, but that he had no right to reject applications or cancel policies, and that, as usual in such cases, the terms of the policies, premiums, the right to reject applications and to cancel licenses of agents was with the company. Plaintiff also offered in evidence a copy of the "Monthly News" of the defendant company for April, 1926, containing an account of Priest's death, and closing with the statement: "On January 1, 1926, Barney was appointed state manager of the state of South Dakota, and it was in the development of that state that he was killed. Salesmen will come and go, but it will be a long time bofore the B. M. P. A. will have in its ranks another one like B. B. Priest."

Much of the evidence offered by defendant was objected to as incompetent, and it therefore seems proper to consider it in two divisions, and, first, that which is concededly competent. It appears that at least up to the 1st day of January, 1925, Priest was operating under the contract above referred to exclusively in the state of Nebraska; and about that date, or late in 1924, the company obtained permission to do business in the state of Kansas. About the same time Priest expressed dissatisfaction over the fact that he was not receiving as large commissions as one Minor, another agent of the company, who testified to the fact and that they talked to Moreland, president of the company, about Priest going into Kansas. This was in January, 1925, and shortly thereafter Priest did go to Kansas, and on March 15, 1925, wrote Moreland: "Will send you cash on all business from now on as I think I am even for the month you promised me that $300 and expenses." He had previously, February 12, 1925, written from Kansas City, Kansas, asking them to send his salary check. May 15, 1925, he wrote from Atchison, Kansas, saying: "Just as soon as it quits raining I am coming to Lincoln and get routed in some part of Nebraska or Kansas where I can make a living." Priest remained in Kansas about two months and returned to Nebraska, carrying on his work

there as before (whether under the contract or a new arrangement uncertain) until early in February, 1926, when he went to South Dakota. He was delayed on account of lack of funds and disposition or sale of his renewals. On January 16, 1926, he wrote Moreland saying he could not get away before a week and to send "that $150 as I want to get all my little bills paid up before I leave." And on January 19, 1926, he again asked for the $150 so he could get to South Dakota, and on January 30 again expressed his anxiety to get to South Dakota, and saying he wanted to get all lined up before he started and to "start with a clean slate." January 26, 1926, Priest received from defendant a check for $100 and on the same day executed his note to defendant for $345, and on February 23, 1926, a note for $100.

The complete account between Priest and the company from September 1, 1924, to March 1, 1926, from the books of the company, appears in evidence, together with some items added subsequent to his death. These will be referred to later. The account contains no entry on the credit side of the $100 a month expense money referred to in the contract, nor the $300 a month salary while he was in Kansas, and charges Priest with the amounts collected by him for premiums upon policies and other items, and shows a balance due from Priest to the company on March 1, 1926, of $1,302.90. This is apparently accounted for from the failure of Priest to make remittances with his reports. It appears from Priest's letters that he was in the habit of retaining the premiums collected to pay his traveling expenses, and he did this with $300 salary in Kansas, resulting in an indebtednes to the company. After Priest's death two items aggregating $12.90 were added to the debit side; August 16, 1926, a credit, called "adjustment," of $935.01, which left a balance due on the account of $380.79. There may be some doubt as to the competency of Moreland and Schmidt to identify the books of account (*Martin v. Scott*, 12 Neb. 42); but no specific objection was made on that score, nor to the accounts for want of proper foundation.

They may be omitted from consideration, being referred to only as explanatory of the transaction between Moreland and plaintiff now to be mentioned. Moreland testified that in August, 1926, he and the plaintiff went over the account of Priest with the company, and the balance above mentioned was agreed upon and a copy of the account given Mrs. Priest and the bookkeeper instructed to give plaintiff the two notes above mentioned, the same having been credited to the account, and Mrs. Priest promised to pay the balance of $380. This evidence is not disputed by Mrs. Priest. In explaining the items of the account, Moreland testified that the $800 salary to January 1, 1925, and $300 salary for a month Priest was in Kansas were included in the adjustment item of $935.01, and the $345 note.

Depositions of several witnesses were taken in South Dakota to the effect that while Priest was up there in March he was looking for agents to undertake the sale of policies in defendant company under him, telling them he was manager in South Dakota. From the evidence of these witnesses this is the work upon which he was engaged while on the trip upon which he met his death. It also appears that he solicited insurance on his last trip. The evidence does not disclose any transactions with the home office originating in South Dakota, nor any communications of any kind betwen Priest and the company, except a letter of March 11, 1926, in which Priest asked some instructions as to how certain printed supplies connected with the new agency were to be used, and the reply thereto expressing pleasure that he had "finally reached the goal." It should be here noted that the letters of Priest were competent evidence. They were objected to as being "transactions with a deceased person;" but such transactions are not themselves incompetent, only certain persons are not permitted to testify concerning them. True, some of the letters were identified by Moreland, who was incompetent to do so, but no objection was made at the time that no foundation had been laid for their introduction. If there had been, the requisite evidence would prob-

ably have been secured. However, they are sufficiently identified by a comparison with Priest's signature to letters introduced by plaintiff.

The above constitutes substantially all the evidence offered by either party, except evidence claimed to be incompetent as being offered by witnesses having a direct legal interest in the suit, and the plaintiff being the representative of the deceased party. The effect of this testimony may be briefly stated as tending to prove an abandonment by the parties of the written contract above referred to, and consists of conversations between Moreland and Priest in January, 1925, in which Priest expressed his dissatisfaction with his work in Nebraska and wanted to go to Kansas, and resulting in an agreement that he should do so at a salary of $300 a month and expenses, to take effect January, 1925. He also testified to another conversation in May, 1925, in which Priest said he was not going to stay in Kansas, and witness told him he could come back in Nebraska and work under the same kind of contract that Minor had, which called for larger commissions than were provided in the written contract, but without any allowance for expenses, which Priest agreed to until the company entered South Dakota. Another conversation in January, 1926, in which they talked about the contract for South Dakota, witness telling him that he would get 80 per cent. commission on all quarterly business, 40 per cent. on all annual business and 5 per cent. on volume, that he should hire and discharge the men and pay them whatever commission he wanted to, not over what he himself was allowed, and whatever he could save to be his as an overwriting commission; that nothing was said in regard to salary; that Priest had not worked on salary since March, 1925; that he was under the impression a written contract for South Dakota had been drawn up, but was unable to find it, and none was ever signed; that the company, at Priest's request, advanced him $100 for his expenses in removing to South Dakota; that the company did not give Priest any instructions as to how he was to conduct the

business in South Dakota, but he was authorized to do so in his own way.

Another witness, whose testimony was objected to upon the same ground, was A. C. Schmidt, a director and assistant secretary of defendant company. He testified that he was present at the conversation in January, 1926, between Moreland and Priest regarding the South Dakota contract, and his testimony is to the same effect as that of Moreland.

Section 8836, Comp. St. 1922, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of the deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness."

The objection to the testimony of Moreland and Schmidt above detailed seems to be well taken. This testimony had to do with transactions and conversations with a deceased person, and the plaintiff is the representative under the provisions of the workmen's compensation act permitting the claim for compensation to be made by the widow, next of kin, or administrator of the estate. *Coster v. Thompson Hotel Co.*, 102 Neb. 585. The only difficulty we have had is upon the question whether or not Moreland and Schmidt have a direct legal interest in the result of the suit. The defendant is a mutual assessment company, and debts and claims against it can only be met by assessment of the members. The by-laws provide that, if the regular assessment be insufficient for payment of claims and expenses, the directors shall have power to order further assessments, apportioned at the legal rate, and the statute requires assessments to be made to pay all losses, and upon failure to do so the officers to become individually liable therefor. Comp. St. 1922, secs. 7861-7866. The by-laws require the officers and directors to be members of the association, and therefore it may be assumed that Moreland and Schmidt were such members. It seems clear that, if the claim of plaintiff is allowed, members of the associa-

tion would be subject to an assessment for its payment and thus have a direct interest in the result. It is argued that for all that appears in the record the company may have sufficient reserve to pay the claim, and that therefore the liability to assessment is so remote as to not constitute that direct legal interest referred to in the statute, but we think the liability of the witnesses is sufficient to disqualify them.

In support of his contention that the evidence is competent, counsel for defendant cite the case of *Bost v. Supreme Council*, 87 Minn. 417, in which it was held that one Gilbert, who was a member of the fraternal association was competent as a witness as to conversations had with the insured, under a statute prohibiting all persons interested in the event of suit from testifying, and is directly in point for the defendant. It may be remarked in passing that the subject of such holding was not referred to in the syllabus. The judge writing the opinion referred to *Perine v. Grand Lodge, A. O. U. W.*, 48 Minn. 82, as sustaining the holding. Upon examining that case it will be found that the witness whose testimony was held competent was not a member of the society at the time of the death of the assured, and at the time of giving his evidence was a member of a subordinate lodge, and the testimony was insufficient to establish, with reasonable certainty, that he would be subject to an assessment to pay any judgment which might be recovered; and the writer of the opinion closed by saying: "Had it appeared that a recovery in this action would directly and certainly subject St. Cyr (the witness) to an assessment of any amount, either by the grand lodge or by the subordinate lodge, he would undoubtedly have an interest in the event of the suit, within the meaning of the statute." It therefore appears that the *Perine* case referred to in the *Bost* case makes for the plaintiff.

The only other case referred to in that connection was *Marvin v. Dutcher*, 26 Minn. 391, to the effect that the disqualifying interest must be such that the witness having

it will either gain or lose by the direct legal operation of the judgment therein, or may be prejudiced in some right by the use of the judgment against himself in some other action or proceeding, which is a substantial statement of the rule existing in this state.

The *Bost* case, however, was followed in *Havlicek v. Western Bohemian Fraternal Ass'n,* 138 Minn. 62, holding that the financial secretary of the local lodge was not an incompetent witness as to transactions with deceased, and also citing *Perine v. Grand Lodge, A. O. U. W.,* 48 Minn. 82, and distinguishing *Peterson v. Merchants Elevator Co.,* 111 Minn. 105, holding that a stockholder of a corporation was so directly interested that he could not testify. These decisions are not convincing.

Appellee also cites *State Bank of Dexter v. Fairholm,* 201 Ia. 1094, holding that neither the president nor cashier of a bank were incompetent to testify as to transactions with the husband or to conversations with him relating to execution of the note in suit by reason of the witness' connection with the plaintiff bank, basing their holding upon the fact that the statute did not exclude the agent of a company from testifying. Moreover section 4604 of the Code of Iowa excluded only parties to the action, which sufficiently accounts for the holding.

On the other hand, in consonance with the general holding, it was held in *Tecumseh Nat. Bank v. Magee,* 61 Neb. 709, and in *Dickenson v. Columbus State Bank,* 71 Neb. 260, that a stockholder in a corporation has such a direct legal interest as to render him incompetent under the statute, in an action in which the corporation was interested. In *Tecumseh Nat. Bank v. Magee, supra,* the test for the determination of the interest of the witness was whether he would gain or lose by the direct operation and effect of the judgment, or whether the judgment would be competent evidence for or against the witness in another action. In either event his interest was such as to disqualify him.

Tested by these rules, it would seem reasonably clear that Moreland and Schmidt were incompetent under the statute to testify to transactions and conversations with Priest. Being officers of the association it will be assumed, in the absence of evidence to the contrary, that they were members thereof and, under the by-laws of the association and the statutes of the state referred to, would be subject to assessment if it were necessary to pay a judgment in this proceeding. It is argued, however, that it is not shown but that the reserve of the association would be sufficient to satisfy the judgment. There is no evidence upon the point, but we do not think that the contingency renders the interest of the witnesses so remote as to render them competent. The reasons for excluding a stockholder of a corporation are of equal cogency when applied to the member of an assessment association. Upon the dissolution of either body the members would have an interest in the distribution of its assets and therefore are alike interested in any proceeding whereby they might be depleted. We think the depletion of the assets or the levying of assessments may be considered as resulting from the direct operation of the judgment. In proceedings to collect the judgment the members could not contest the existence of the indebtedness, and therefore the judgment would be evidence against them. They were interested in preventing the recovery of the judgment and therefore disqualified from testifying to transactions with decedent against his representative. The instant case, when submitted to the tests laid down in *Tecumseh Nat. Bank v. Magee, supra,* seems to fulfill them.

In *Cronin v. Supreme Council of the Royal League,* 199 Ill. 228, it was held that a member of a beneficiary association was within the disqualifying statute.

The question remains whether or not, excluding the incompetent testimony of Moreland and Schmidt, plaintiff has produced sufficient evidence to sustain a finding that at the time of his death Priest was an employee of defendant.

It has been frequently said that the basis underlying compensation statutes is the proposition that the industry in which the claimant is employed should bear the loss of his injury or death growing out of and in the course of his employment. If we can discover in what industry Priest was engaged at the time of his death we will have found the party liable for the compensation provided by statute.

The evidence is not conclusive upon the question. The plaintiff claims that by the written contract in evidence Priest became an employee of the defendant (we do not decide the point), and that in the absence of competent evidence of a change in their relations, the same continued to the time of his death. This may be conceded, but the defendant claims that the presumption is destroyed by the subsequent conduct of the parties, showing, as is claimed, that when Priest went to South Dakota he became an independent contractor engaged in a business of his own. The facts tending to show such change of relations and an abandonment of the written contract are, that Priest changed his place of work from Nebraska to Kansas at a fixed salary of $300 a month and expenses, in about February, 1925; that upon his return to Nebraska he worked under a contract substantially the same as that of Minor, and not under the written contract, and later, about January 1, 1926, was appointed state agent for South Dakota, as contemplated by the terms of the written contract, his compensation to be agreed upon. There is no competent evidence that any agreement was ever concluded as to his compensation as state manager.

As further evidence of abandonment of the written contract, defendant points to the giving by Priest of the note for $345 on January 26, 1926, the advance to Priest on that day of $100, which Priest refers to as $150, to enable him to go to South Dakota, and Priest's note for $100 dated February 23, 1926. It is important to note in this connection that the contract under which Priest began his connection with defendant provided that "he shall have the

first privilege of any state opened so long as this contract is in force and effect, until he gets a state that is desirous to him," indicating an understanding that in that event the contract should end and a new one be entered into as provided for therein.

It further appears that while in South Dakota Priest was engaged in activities properly looking toward the establishment of an insurance agency of which he would be the head in that state.

We think it must be conceded that the management of an insurance agency which employs subagents for soliciting insurance of various kinds and for a number of companies may be considered as an industry in itself, enjoying the privileges and bearing the burdens of the workmen's compensation act; and that such industry may be established though the business is confined to writing insurance for one company. Persons engaged in that industry are in no sense employees of the insurance companies represented by them. Such agencies are numerous and well known to the business world. It has not been brought to our attention that a claim was ever made that agents in that business were employees of the single or several companies they represent, and the plaintiff in this case makes no such claim. In *Christensen v. Protector Sales Co.*, 105 Neb. 389, Christensen "undertook to sell defendant's products to the retail trade on a commission basis." He was assigned a territory, given an advancement, furnished with samples and advertising matter, took two orders for merchandise, and on the second day was accidentally killed while traveling by automobile in his territory. Defendant had other salesmen working under a similar agreement, each assigned to separate territory. We held that a finding that plaintiff was an independent contractor was sustained by sufficient evidence, Morrissey, C. J., remarking:

"The relationship existing between these parties may be likened to that between insurance solicitors and their companies. When day dawns the agent is free to work or play. If he idles away the day, he does so at his own loss. The

company has the right only to revoke the agency agreement. Christensen was free to make his sales by writing letters to the dealers within his territory; he might have called them by telephone, or he might have employed subagents."

Was Priest such an agent at the time of his death? The question is by no means free from difficulty; in fact, we have found it a very perplexing one. Upon a critical examination of the competent evidence in the record, we have reached the conclusion that the reasonable view to take of the situation is that at least on January 1, 1926, Priest ceased to be an employee of defendant and entered upon an independent career as owner and manager of an insurance agency in South Dakota, under the appointment of defendant, but not subject to defendant's control as to the manner in which such agency should be conducted, where, in the state, it should be established, nor under any superintendence or supervision of defendant, such as is present in the relation of employer and employee; that Priest was engaged in a separate industry and his relation to defendant was that of independent contractor. We are at least convinced that the plaintiff has failed to establish by sufficient evidence that Priest was an employee of defendant at the time of his death, and that the finding that he was an independent contractor is sustained by sufficient evidence. It follows that the judgment of the district court is right, and it is AFFIRMED.

GORDON STATE BANK, APPELLEE, v. EDWARD W. HINCHLEY ET AL., DEFENDANTS: GRACE CARNEY ET AL., APPELLANTS.

FILED JUNE 15, 1928. No. 25660.

Mortgages: FORECLOSURE: SALE: INCREASE OF BID. In the confirmation of a judicial sale under a decree of foreclosure of a mortgage, under the statute now in force, where the owner of the property is not in justice and equity injured thereby, it is not error for the court to allow the bidder to increase his bid on the hearing for confirmation of the sale.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Lloyd H. Jordan and *A. C. Plantz,* for appellants.

R. L. Wilhite, contra.

Heard before GOSS, C. J., ROSE, DEAN and THOMPSON, JJ., and LANDIS, District Judge.

PER CURIAM.

This is an appeal from an order confirming a sale of real estate on decree of foreclosure of a mortgage. No bill of exceptions was filed in this court. The only questions involved arise on the record. All center around one point, which we will state.

The decree appears to have been dated October 1, 1924, and for the sum of $1,939.48, with interest at 10 per cent., and costs. This lien found in favor of the plaintiff was subject to a certain prior lien. The land was once offered under an order of sale issued pursuant to the decree and was sold for $500, subject to incumbrances of record. This sale was set aside. The land was again offered for sale and was sold to the Gordon State Bank of Gordon, appellee, for $500, subject to incumbrances of record, which the court found, in his journal entry and order for confirmation, to amount to $3,000, the plaintiff's lien on said day amounting, as the court also found, to the sum of $2,342.52. The court being of the opinion that $3,500 was not a fair value for said real estate, thereupon the plaintiff, in open court, raised his bid to the sum of $2,342.52, subject to the unpaid first mortgage and unpaid interest thereon and taxes against said real estate. After duly considering said bid, which he found would amount to a payment of $5,342.52 for the land, the court found "that the last mentioned bid by the plaintiff is a fair value for said real estate and a fair consideration for the same, and that said real estate would not bring to exceed more than said bid

if again offered for sale." Thereupon the court overruled the objections to confirmation and confirmed the sale.

The only real question for consideration is whether the court erred in allowing the plaintiff to raise his bid on the hearing for confirmation.

In *Green v. State Bank*, 9 Neb. 165, the order confirmed the sale "upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant upon receipt of $2,000 within sixty days from this date." The court, it was said, had no authority to impose such condition or to change or modify the terms of the sale. In *Fitch & Co. v. Minshall*, 15 Neb. 328, it was held that the court could not make its confirmation conditional. In *Griffith v. Jenkins*, 50 Neb. 719, the confirmation order showed that the purchaser, in open court, raised his bid without disclosing why or that any condition was imposed by the court.

Under the law formerly, when the real estate levied upon was appraised, it could not be sold for less than two-thirds of the appraised value. The regularity of the sale and fairness of the price are now determined by the court, which determines what circumstances and conditions will justify confirmation. The court has equity powers in passing upon a judicial sale, and may exercise sound discretion and even impose conditions so long as they are not arbitrary.

Appellants were not prejudiced, and should not complain of error in their favor, if any.

In the confirmation of a judicial sale under a decree of foreclosure of a mortgage, under the statute now in force, where the owner of the property is not in justice and equity injured thereby, it is not error for the court to allow the bidder to increase his bid on the hearing for confirmation of the sale.

For the reasons stated, we are of the opinion that there is no merit in the appeal. The judgment of the district court is therefore AFFIRMED.

MERIDIAN HIGHWAY BRIDGE COMPANY, APPELLANT, V. CEDAR COUNTY, APPELLEE.

FILED JUNE 15, 1928. No. 25945.

1. **Taxation.** Under section 5820, Comp. St. 1922, "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."
2. ———: BOARD OF EQUALIZATION: DISCRETION. The sound discretion reposed in the board of equalization to hear and determine the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon.

APPEAL from the district court for Cedar county: MARK J. RYAN, JUDGE. *Affirmed.*

B. Ready & Son, for appellant.

Clarence E. Haley and *R. J. Millard, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

The Bridge Company appeals from an order fixing the valuation of the Meridian Highway bridge in Cedar county, Nebraska, at $400,000 for purposes of taxation for the year 1926.

The Cedar county assessor fixed the valuation at said sum and, on a hearing before the board of equalization of the county, wherein the Bridge Company protested that the assessment was too high and requested an adjustment, the board made an order adhering to the assessment; and on appeal and hearing before the district court the objections of the Bridge Company were overruled and the valuation by the board of equalization was sustained and approved. On the overruling of a motion for a new trial the case was brought here for review. In addition to the conventional errors that the findings are not supported by the evidence, and are contrary to the evidence and to law, and

errors of law occurring at the trial, it is assigned that the income from the bridge was not considered in fixing its value and that the value of the bridge stock, likewise, was not considered.

It is alleged in the petition, and admitted in the answer, that the Meridian Highway Bridge Company is a corporation, with its principal place of business in Yankton, South Dakota; that on October 16, 1924, the bridge in question was completed and opened for public travel across the Missouri river, with its northern terminal in Yankton and its southern terminal in precinct No. 2 in Cedar county; that 70 per cent. of the bridge is in Cedar county; that for the year 1926 the county assessor of Cedar county valued that part of the bridge in Cedar county at $400,000, which the company alleged to be excessive and to which it filed its objection before the board of equalization, and, upon a hearing on June 19, 1926, the board of equalization overruled the objections and fixed that valuation; and that said bridge was built to be used as a combined railroad and wagon bridge. The petition alleged that, to give the bridge the proper strength for a railroad bridge, it was necessary to expend three times the amount of money necessary for a wagon bridge, and that the expenditure made for railroad purposes is bringing no income whatever and there are no prospects, even remote, of its being used for railroad purposes.

The evidence is not as complete as we would like to have it. No testimony was offered upon behalf of the county. The entire bill of exceptions, including two exhibits, consists of eleven pages.

There was testimony showing that the bridge cost the sum of $1,169,367.17. Just to give something of a view of its liabilities, we learn, from a statement introduced in evidence, that it has bonds outstanding of $270,000, capital stock $823,325, undivided profits $13,615.24, and reserved for depreciation $21,925.64; its operating statement for the year 1925 shows that its chief receipts are bridge tolls, $62,478.80, and its principal disbursements are, ex-

penses $19,324.26, interest on bonds $17,100, depreciation of bridge $17,540.51. These items account for all but a few hundreds of its receipts and disbursements. The total receipts being $63,051.60 and disbursements $55,005.80, according to the statement, the net profit remaining was $8,045.80.

The county assessor was made a witness for the plaintiff. His testimony in full is as follows: "Q. Mr. Fornisch, you are the present county assessor of Cedar county? A. I am. Q. And as such assessor you fixed the value of the Meridian Highway bridge, did you? A. Yes, sir. Q. At $400,000? A. Yes, sir. Q. And from that you, or rather the board of equalization, made an assessment, did they not? A. Yes, sir. Q. In fixing the valuation at $400,000, did you or the board of equalization take into consideration the earnings of the bridge? A. We did not."

Cross-examination. "Q. What did you take into consideration in fixing the value? A. I took nothing but the physical valuation. Q. That is what you did in this case? A. Yes."

There is nothing shown in the evidence as to the amount of taxes that would be produced by the valuation fixed. At the rate of state taxes for the year 1928, the state taxes would be $1,500, county taxes are usually a like amount, and school taxes may roughly be estimated at an amount equal to both the county and state. So, in the ordinary course, merely for the purpose of throwing some light on the consideration, it may be said that the total taxes on the valuation fixed would be in round numbers approximately $6,000 for the one year in which the assessment in question would be in effect.

Under section 5820, Comp. St. 1922, "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." It is rather difficult to estimate the value of property like that of the bridge in question in the market in the ordinary

course of trade, because there is so little trading in or selling of such properties. Other tests have to be applied than those arrived at by actual barter.

Just what was meant by the assessor himself in his expression "physical valuation" is not explained. In connection with the context, it is quite likely he meant the actual valuation as he viewed it in his capacity as assessor. He testifies that he and the board did not take into consideration the earnings of the bridge. There is nothing in the evidence to show either that these earnings or the value of the stock in the company were or were not brought to the attention of the board of equalization in their hearing. It does not matter much, as the question here is as to the actual value of the property for taxation purposes. The reasons that guided the assessor and the board might be helpful in determining the action of the court.

However, let us analyze the matter of capital, earnings and net income as if they had been presented to the board of equalization. Over $800,000 of the cost value of the bridge was in Cedar county. This, as we understand it, was the first valuation for purposes of taxation since its completion. For potential uses it was a railroad bridge as well as a bridge for vehicles. The event has proved that, up to the time of trial, the owners had no contract for its use by railroad. It actually cost a total of about $800,000 more than it would have cost for the use of vehicles alone. On what needed to have been a cost of less than $400,000, it had a gross operating income of $62,478.80, with expenses of $19,324.26. This would have left a fair margin for a reasonable return in a formative year on the necessary capitalization for a vehicle bridge. For we may assume that toll bridges, like most new ventures, require publicity and advertisement before they become known. For the purpose of testing this it would be interesting to compare the income of 1925, furnished at the trial, which took place on January 14, 1927, with that of 1926. We are without that aid, as no inquiry was made by either party as to income for 1926 for what light it might throw upon

the valuation fixed by the board in the spring of 1926. The board had a right to attribute some actual value to that portion of the bridge devised and intended for railroad purposes. It could not be said in 1926 that it was not of some substantial value. To compare it with property more within common knowledge we might consider an alfalfa field, which in the year of catching a crop is of comparatively little use or value; or an office building, which for the first year, or often longer, produces a small net income. And yet will any one say that neither the field nor the building shall be taxed so low as to bear no fair relation to its ultimate value, based on its intended use? So, attributing some actual value to that portion of the bridge erected with special reference to railroad uses and considering the earnings in the first year after the opening of the bridge, there was a reasonable basis for the actual value of $400,000 as fixed by the board and approved by the district court. There was some testimony of the president of the company that in the past some of the stock had sold for $20 to $25 a share, but this would not be indicative alone of a valuation of the property so very far different from the valuation contended for by the county.

We are loath to interfere with the sound discretion reposed in boards of equalization to value real property at its actual value. Where the action of such a board does not appear to have been exercised arbitrarily nor to have omitted to take into consideration the proper and necessary elements to be considered in fixing the value, its action ought not to be disturbed. Here the valuation might have been rather high for the particular year, and yet we do not feel disposed to find, on what evidence was submitted to us, that it was. We think the proper rule is that the sound discretion reposed in the board of equalization to hear complaints and determine on the valuation of property will not be disturbed by this court, unless so manifestly wrong that reasonable minds cannot differ thereon.

This principle is found in *Field v. Lincoln Traction Co.*, 74 Neb. 418, and *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526.

We conclude that the judgment of the district court is right and it is

AFFIRMED.

JOHN MARTIN, GUARDIAN, ET AL., APPELLANTS, V. C. FRANK REAVIS ET AL., APPELLEES.

FILED JUNE 15, 1928. No. 25957.

1. **Contract** set out in the opinion examined, and *held* to be unambiguous.
2. **Contract**: CONSTRUCTION. Where, in litigation, an unambiguous written contract is drawn in question, its construction and legal effect is for the determination of the court, and not the jury.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Adams & Zimmerman and *Herman Ginsburg*, for appellants.

F. B. Baylor, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOOD, J.

This is an action to recover from defendants, who are attorneys at law, $1,666.66, which it is alleged belongs to plaintiffs and is wrongfully withheld by defendants; also to recover, as a penalty, thrice the amount retained, on the theory that it was procured by deceit practiced by the defendants. Defendants admit the retention of the $1,666.66; assert that it was due them as attorney's fees under a written contract of employment as attorneys for plaintiffs, and deny that any deceit was practiced. On a trial of the issues, after all the testimony was taken, a verdict was directed for defendants. Plaintiffs have appealed.

From the record it appears that Mary Barrett, a maiden lady, possessing an estate of approximately $100,000, died testate, leaving her surviving, as her next of kin and heirs at law, a number of sisters and brothers and children of deceased sisters and brothers. In her will she made 13 specific bequests, aggregating $14,050. One clause of the will bequeathed a legacy of $5,000 to Elizabeth Cunningham, a sister of testatrix. There was a residuary clause in which she bequeathed and devised the residue and remainder of her estate to her brother, William Barrett, upon the condition that he should pay all the other bequests and legacies provided for in the will. The latter part of this clause is, in part, as follows: "It is my will and intention and I do hereby direct that the said William Barrett, to whom I give my entire estate, both real and personal property, subject, however, to the payment of all the specific bequests and legacies mentioned in my will." The sister, Mrs. Cunningham, predeceased the testatrix.

Shortly after the death of Miss Barrett, her next of kin and heirs, other than her brother William, employed defendants to resist the probate of the will of Mary Barrett. At the time of the employment the defendants were informed that William Barrett claimed that he did not have to pay the $5,000 bequest to Mrs. Cunningham. After some conversation and preliminary investigation, a written contract of employment was entered into. The contract was dictated by Mr. Beghtol to the firm's stenographer in the presence of a number of the interested parties, after which the contract, or copies thereof, were signed by the various parties. The contract provided:

"Whereas, the undersigned are heirs of Mary Barrett, deceased, and desire to employ the firm of Reavis & Beghtol as their attorneys to represent the undersigned in litigation arising out of a proposed contest of the will of said Mary Barrett.

"Now, therefore, it is agreed that said Reavis & Beghtol will act as attorneys for the undersigned in all matters arising out of the will of Mary Barrett deceased in what-

ever court or courts the same may be brought and shall receive as their only compensation therefor an amount equal to thirty-three and one-third per cent. of the property or money realized by the undersigned from the estate of the said Mary Barrett, it being understood that said attorneys are not to compromise said suit without the consent of the undersigned."

Pursuant to this employment, the defendants prepared and filed objections to the probate of Miss Barrett's will. A hearing was had in the county court, resulting in the overruling of the objections and admitting the will to probate. Contestants appealed to the district court, where defendants conducted the trial, lasting about a week, which resulted in a judgment sustaining the will. Thereupon, the defendants, after further consultation with their clients, instituted in the federal court an action on behalf of the children of Mrs. Cunningham for the construction of the will, whereby it was hoped to obtain a decree, holding that the clause in the will devising the residue of Mary Barrett's estate to William Barrett, upon the condition that he pay the specific bequests in the will, would be held a condition precedent to the vesting of title in him; that, on account of the death of Mrs. Cunningham, a payment of the legacy could not be made to her and the condition precedent could not be performed; that the residuary devise and bequest to William would lapse and would be disposed of as though testatrix had died intestate; and with a view to obtain the Cunningham legacy for plaintiffs.

Defendants in the action in the federal court, who were the executors of the will of Mary Barrett, filed a motion to dismiss the action which, under the federal practice, amounted to a demurrer to the petition. In other words, the filing of such motion was the equivalent of saying that the facts therein alleged were insufficient to entitle the plaintiffs to any relief. Necessarily, this implied that the plaintiffs were not entitled to the legacy which had been bequeathed to their mother, Elizabeth Cunningham. The federal court overruled the demurrer, and immediately

thereafter the executors paid to Reavis & Beghtol, as attorneys for the Cunningham heirs, plaintiffs in this action, $5,000, the amount of the legacy left to Elizabeth Cunningham. Defendants in this action immediately wrote letters to their clients, informing them of the receipt of the $5,000 and making a statement as to the amount to which each was entitled after deducting one-third thereof for attorney's fees and some small items of expense, and enclosed checks for the respective amounts. These checks were received by the plaintiffs and cashed, and they retained the proceeds without objection. Several months later, the federal court decided that the payment of the Cunningham legacy was not a condition precedent to the vesting of the residuary estate in William Barrett. It then became apparent that plaintiffs could receive nothing further from the estate of Mary Barrett, and this action was begun.

Plaintiffs contend that the written contract is ambiguous and that they were entitled to introduce oral testimony to explain what was meant by its terms, asserting that they were intended to and did mean that defendants in this action were to receive a sum equal to one-third of the amount which they should recover by the litigation over and above the legacy to Elizabeth Cunningham.

We think this contention is not well-founded. A careful examination of the contract makes it apparent that its terms are clear, easily understood and are not ambiguous. The contract provided in unequivocal terms, which any ordinary person could understand, that defendants in this action were to receive for their legal services one-third of the amount which plaintiffs might realize out of the estate of Mary Barrett. In this action no reformation of the contract is sought, and, had it been, the evidence is insufficient to sustain such a contention.

In *Clark v. Hall*, 54 Neb. 479, it is held: "Where a written contract is the basis of an action and neither party asks for a reformation thereof, it is the duty of the court to ascertain its meaning and enforce it accordingly." And in *Western Mfg. Co. v. Rogers*, 54 Neb. 456, it is held: "The

interpretation of a written contract is for the court and not for the jury, when it is capable of being construed by its terms alone, unaided by extrinsic facts." Like rulings are made in *Ricketts v. Rogers,* 53 Neb. 477, and *Meyer v. Shamp,* 51 Neb. 424. Moreover, in the present action the plaintiffs, themselves, pleaded the contract in their petition and, in the absence of any demand for reformation, are bound by the terms of the contract as pleaded. *Carey v. Zabel,* 112 Neb. 16.

Under the rules thus announced, the contract itself being unambiguous, it follows that its construction and legal effect was a question for the court and not for the jury.

Plaintiffs further contend that both parties to the contract of employment understood it to mean that counsel were to receive only one-third of what was secured by defeating the probate of the will, or, at least, that this was the understanding of the plaintiffs in this action; that defendants knew that plaintiffs so understood the contract, and that therefore this interpretation should be placed upon the contract.

There is no evidence to sustain this contention. After the terms of the contract were dictated, it was read over and there was no discussion of its terms or the meaning thereof; nor was there, at any subsequent time, any such discussion between the parties to the contract. In this connection, it is also significant that, after the will contest had been finally disposed of in the district court, and plaintiffs and their counsel, defendants in this action, had concluded to abide by that decision, the action in federal court was begun without any other agreement or understanding as to attorney's fees. It seems quite clear that plaintiffs and defendants relied upon and understood that the written contract still covered and fixed the terms of employment for that litigation; and yet, if the contention now made by plaintiffs is true, there could have been no compensation to the attorneys for the services to be rendered in the federal court. There is no basis for the contention that both parties to the contract understood it to have the

meaning contended for by plaintiffs. The evidence discloses that the defendants in this action rendered extensive legal services for the plaintiffs; that, by the written contract entered into, they were entitled to the amount which they retained for legal services. This disposes of the first cause of action.

The second cause of action is grounded on the assumption that the amount retained by defendants as counsel fees was procured by deceit, and that plaintiffs are entitled to recover thrice the amount as a penalty, pursuant to the provisions of section 265, Comp. St. 1922. The record does not disclose that defendants were guilty of any fraud or deceit or of any unprofessional conduct, and is absolutely barren of any fact which would support the second cause of action.

On the record made, there was nothing to submit to the jury. The trial court properly directed a verdict for the defendants. The record is free from error, and the judgment is

AFFIRMED.

CHARLES CECH, APPELLANT, V. JOHN H. COSTELLO, APPELLEE.

FILED JUNE 15, 1928. No. 25853.

1. **Fraudulent Conveyances**: SALE IN BULK. "One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 2561, Comp. St. 1922, commonly known as the 'Bulk Sales Law,' will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee." *Home Pattern Co. v. Gore*, 113 Neb. 535.

2. ———: ———: LIMITATIONS. Ordinarily, and in the absence of facts which constitute an equitable estoppel, a creditor under the bulk sales law may assert his right against one who has purchased, in bulk, the merchandise of his debtor without compliance with the provisions of such law, at any time within the general statute of limitations.

3. **Estoppel.** "In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were known to the parties against whom the estoppel is urged." *City of Lincoln v. McLaughlin*, 79 Neb. 74.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Wallace S. Porth and *McElfresh & Walker*, for appellant.

W. M. Cain and *B. F. Farrell, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and HOWELL, JJ., and CLEMENTS and REDICK, District Judges.

CLEMENTS, District Judge.

This action was brought by Charles Cech against John H. Costello to recover $2,850.81, interest, and costs.

The plaintiff pleads that he was a creditor of one Walter Wolfe, the owner of a stock of merchandise, in Schuyler, Nebraska; that such stock of merchandise was sold in bulk to the defendant, John H. Costello; that in such sale no attempt was made to comply with the bulk sales law; that the plaintiff's claim was not paid, but was reduced to judgment; that an execution issued thereon and was returned unsatisfied; that an affidavit for garnishment in aid of execution was filed in the district court for Colfax county against the defendant; that the defendant answered therein, and that his answer was unsatisfactory.

The defendant, as a defense to this action, pleads in substance: Admits the purchase of the goods; alleges that the plaintiff had actual notice of the sale, but did not seek to enforce his claim until nearly a year after the sale and until the purchase price of the goods had been fully paid, and claims that the plaintiff is thereby estopped to recover from the defendant under the provisions of the bulk sales law.

The case was tried to a jury. At the close of the evidence each party moved for a directed verdict. The court discharged the jury, entered a finding for the defendant, and dismissed the action. The plaintiff appeals.

The facts in this case are not greatly in dispute and, as shown by the pleadings and evidence, are as follows:

On January 1, 1922, one Walter Wolfe was indebted to the plaintiff in the sum of $2,500 for wages as a farm laborer, and on that date made and delivered to the plaintiff his promissory note to evidence such indebtedness, due and payable one year from date. Said Walter Wolfe, at the time said note was given, was the owner of and operated a grocery and meat business in the city of Schuyler, Nebraska. He continued to own and operate said store until March 25, 1923, when he sold the same to the defendant for the sum of $17,000; $8,000 of which was for the stock of merchandise. At the time of this sale, the note of the plaintiff was due and unpaid, and plaintiff was a creditor of the seller of said goods. The sale of the merchandise was made in bulk, and no attempt was made to comply with the provisions of the bulk sales law. Comp. St. 1922, sec. 2561. The contract of sale was signed March 25, 1923. The invoice was taken Sunday, March 26, 1923, and the possession of the store and merchandise turned over to the purchaser on the evening of that day. No inventory was taken five days before the sale. The purchaser did not demand or receive of the seller a written list of names and addresses of creditors of the seller, with the amount due or owing to each; nor did the purchaser, five days before taking possession of such merchandise or paying therefor, notify personally, or by registered mail, the creditors of the seller, of the proposed sale, and of the price, terms and conditions thereof. On the day that the sale was made, the plaintiff was working on the farm of Walter Wolfe, some distance from Schuyler. On that evening he came to Schuyler, and learned from his mother that a sale of the Wolfe store had been made. He went to the store on that evening, and saw the defendant behind the

counter, serving customers. He went to the store the next day, Sunday, and found it locked. He looked through the window and saw an invoice being taken. He learned the next day, Monday, that the sale had been completed, but did not learn then, nor until after the garnishment proceedings had been commenced, the terms and conditions of the sale. He waited about one year before bringing suit on his note.

From these facts the trial court found he was estopped from asserting his claim as a creditor against the purchaser of the goods, under the provisions of the bulk sales law. In this, we think the court erred.

"One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, without having complied with the provisions of section 2561, Comp. St. 1922, commonly known as the 'Bulk Sales Law,' will be held to be a trustee for the benefit of the creditors of his vendor and liable as garnishee." *Home Pattern Co. v. Gore*, 113 Neb. 535.

Defendant Costello concedes that this is the law applicable to sales of merchandise in bulk, and concedes that in the sale to him of the Wolfe stock the bulk sales law was not strictly complied with, but contends that the plaintiff had knowledge of the sale before its completion, and could have readily estimated the probable price, terms and conditions, and that this was a sufficient substituted compliance with the statute, citing, *Home Pattern Co. v. Gore, supra.* There is nothing in this case to sustain such a theory. In the *Gore* case, the court said:

"The record nowhere shows that the purchaser sent the required notice to any creditor, as the statute plainly says he should do, for the only communication between any of the parties to the sale and the creditor was the request made by Gore, the seller, that a representative of the creditor be sent to make the appraisement. This request by Gore cannot be construed to be a notice sufficient to comply with the statute, for it does not appear that this communication contained any notice of the price, terms or condi-

tions of the sale. Nor does the participation of Chapman in the routine work of appraising the stock amount to a waiver on the part of appellee of its rights under the bulk sales law."

If notice to a creditor that a sale is being made and participation of a representative of the creditor in the invoice and appraisement of the merchandise is not a sufficient notice under the statute, how can it be said that knowledge by the creditor that a sale is in progress and an invoice being taken, derived, not from the parties to the sale, but casually, will constitute such notice, and how would a farm laborer, by looking through a window at an invoice of a stock of merchandise being sold, be able to estimate the probable price, terms and conditions of such sale. The court is satisfied that there was not a sufficient compliance with the bulk sales law, and that defendant, Costello, in the purchase of the Wolfe stock became a trustee for the benefit of Wolfe's creditors, of which the plaintiff was one.

The defendant says, however, even if this be true, the plaintiff cannot recover herein because he is estopped to assert his claim against the defendant by his laches in not bringing any suit on his note for nearly one year after the sale of the merchandise, and after this defendant had paid the full purchase price thereof. No time limit is fixed by the terms of the bulk sales law within which a creditor must assert his right against a purchaser who buys without compliance with the provisions of the law. Ordinarily, and in the absence of facts which constitute an equitable estoppel, a creditor under the bulk sales law may assert his right against one who has purchased in bulk the merchandise of his debtor without compliance with the provision of such law at any time within the general statute of limitations. There can be no equitable estoppel in this case for two reasons:

"In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts upon which it is sought to make the estoppel operate were

known to the parties against whom the estoppel is urged." *City of Lincoln v. McLaughlin*, 79 Neb. 74.

The only possible theory upon which an equitable estoppel in this case can be based is that plaintiff did not attempt to assert his right until after the defendant had paid the last instalment of the purchase price, and thus changed his position to his damage. But the plaintiff had no knowledge that there were any deferred instalments. The terms and conditions of the sale were not made known to him. He had a right to assume that the purchase price had been paid at the completion of the sale.

A buyer of a stock of merchandise in bulk, who negligently fails to require the seller to furnish him a certified list of his creditors, will not be heard to assert mere laches as against a creditor who fails to promptly notify him of his claim, or take steps to enforce it.

Charles Cech was a farm laborer, unacquainted with his rights under the law. He knew nothing of the terms or conditions of the sale. He attempted to collect his claim without applying to the defendant. A procedure which, if it had been successful, would have been to the benefit of the defendant. He was forced to turn to the defendant or lose his claim.

There are, in the record, no facts that justify a finding that he was estopped to bring this action.

The judgment of the district court is, therefore, reversed, and the cause remanded for further proceedings.

REVERSED.

RATHBONE COMPANY, APPELLEE, V. CURTIS C. KIMBALL, APPELLANT.

FILED JUNE 15, 1928. No. 26550.

1. **Judgment: TRANSCRIPT: LIEN.** A transcript of a judgment of the district court of one county, when filed in another county, does not become a lien upon the property of the debtor until entered upon the judgment record of the latter county.

2. ———: **STATUTES: LIEN.** Statutes of this state, set out in

the opinion, governing liens of judgments in state and federal courts, examined, and *held* to be in exact conformity as relates to such judgments and the liens thereof.

3. ———: JUDGMENTS OF FEDERAL COURTS: LIEN. Judgments of the federal courts of the district of Nebraska are liens upon the property of the judgment debtor only in the county in which they are rendered, unless a transcript thereof is filed and entered on the judgment record of other counties of the state; when so filed and entered they become liens.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Lester L. Dunn, for appellant.

Peterson & Devoe, contra.

Herman Aye, amicus curiæ.

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action for specific performance of a contract for the sale of real estate under the terms of which the vendor agreed to furnish an abstract of title showing title of record in the grantor, free of incumbrance.

The defendant filed a demurrer to the petition upon the ground that said petition failed to state facts sufficient to constitute a cause of action; demurrer was overruled, and defendant declining to plead further, and electing to stand upon his demurrer, judgment was entered for specific performance, and defendant appeals.

The ground of the demurrer was that the petition failed to allege that the abstract furnished by plaintiff included certificates as to judgment liens against the plaintiff in the records of the federal courts of the several federal divisions in the state of Nebraska, except the division of which Lancaster county, in which the real estate was located, is a part; the defendant claiming that such certificates were necessary in order to show unincumbered title in the plaintiff.

Appellant in his brief states the problem to be solved in the following language:

"The sole issue presented on this appeal is whether federal judgments in the state of Nebraska are a lien on all property of a judgment debtor within the state of Nebraska without the filing of any transcript thereof, or whether federal judgments are a lien without transcript only in the county in which the judgment of the federal court is entered."

The question is important and new in this jurisdiction, and involves construction of the act of congress, August 1, 1888, 25 U. S. St. at Large, ch. 729, p. 357, and sections 8937, 8939, Comp. St. Neb. 1922, and section 8986, as amended by chapter 59, Laws 1927.

Section 1 of the act of congress of August 1, 1888, is as follows: "An act to regulate the liens of judgments and decrees of the courts of the United States.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That judgments and decrees rendered in a circuit or district court of the United States within any state, *shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state*: Provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state."

Section 8986, *supra*, as amended, reads as follows: "The lands and tenements of the debtor within the county where

the judgment is entered, shall be bound for the satisfaction thereof, only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution: Provided, that a judgment or decree shall be considered as rendered when the court announces its findings of such judgment or decree and enters such finding on the trial docket."

Sections 8937 and 8939 are as follows:

8937. "The transcript of a judgment of any district court in this state may be filed in the office of the clerk of the district court in any county; and such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed in like manner as in the county where such judgment was rendered, and execution may be issued on judgment obtained by such transcript as on the original judgment: Provided, such transcript shall at all times be affected and be in the same plight as the original judgment."

8939. "A transcript of any judgment or decree rendered in a circuit or district court of the United States, within the state of Nebraska, may be filed in the office of the clerk of the district court in any county in this state, and such transcript, when so filed and entered on the judgment record, shall be a lien on the property of the debtor in any county in which such transcript is so filed, in the same manner and under the same conditions only as if such judgment or decree had been rendered by the district court of such county: Provided, such transcript shall at all times be affected and be in the same plight as the original judgment."

It will be observed that by the act of congress above quoted the same was to be in effect only, at least so far as transcripted judgments are concerned, in such states as should pass laws authorizing "the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and

requirements relating to the judgments and decrees of the courts of the state." The precise question for determination, then, is whether or not the above quoted laws of Nebraska have provided for liens of judgments rendered in the federal courts of the state in exact conformity with liens of judgments in the state courts, and is separated into two propositions by the briefs, (1) as to liens of judgments in the county where rendered, and (2)) as to such liens where the judgment is transcripted to other counties.

Inasmuch as the objection to the abstract in question relates only to the lien of judgments in counties other than that in which they were rendered, it may not be acutely necessary to consider the first proposition; but, in view of the importance of the question and its somewhat close relationship to the second proposition, we have concluded to discuss it briefly and announce our views upon it. Herman Aye, an attorney of this court, was permitted to file a brief as *amicus curiæ,* and makes the point that under the Nebraska laws as they now stand "a judgment creditor in the federal courts of Nebraska can obtain a lien in the county where the judgment is rendered only by filing a transcript of such judgment in the office of the clerk of the district court for such county, whereas the holder of a judgment in a state court obtains a lien upon the lands of the debtor in the county by mere rendition thereof;" thereby contending that a lack of conformity exists. We are unable to accept this view for the following reasons:

The act of congress antecedent the proviso provides that judgments of federal courts "shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state." This language makes the judgment of the federal court a lien under precisely the same conditions that it would become a lien if rendered in a state court of general jurisdiction, and, in effect, incorporates in the act of congress the state statute, the same as though it had been therein copied *in extenso.* It is, there-

fore, perfectly clear that the provisions of section 8986, as amended, are by the act of congress made applicable to judgments of the federal courts, which are invested with the same qualities as to their binding effect upon the lands of the debtor as are given to domestic judgments. It is true that federal judgments are not mentioned in the section and that it purports to deal only with judgments of state courts, nevertheless, as above noted, the act of congress incorporates it, and no further legislation is required to make it applicable to federal judgments. The act is broad enough to make it applicable to the state statute existing at the time of the passage of the act, and also to respond to changes or amendments of such statute affecting the judgments of state courts. The act of congress was intended to limit the existing rule when the state passed the statutes referred to *Rhea v. Smith,* 274 U. S. 434. If it be contended that section 8986, as amended, because it did not refer to federal court judgments, was not a compliance with the conditions of the proviso of the act, then the federal act preserved the lien in the county where the judgment is rendered. It cannot be presumed that congress intended to permit the lien of judgments of its courts in the county where rendered to be defeated or destroyed by failure of the state to act. The effect of such failure was to leave the federal act in full force. Assume, if you will, that the state has failed to act with reference to judgments in the county where rendered; nevertheless, the state having made adequate provision, as later shown, for transcripted judgments in other counties, the limitation of the former rule sought to be accomplished is complete *pro tanto.*

Considerable space in the briefs is devoted to the discussion of the repeal by congress of the third section of the act of August 1, 1888, as amended by the act of March 2, 1895, 28 U. S. St. at Large, ch. 180, p. 813, and section 2, ch. 30, Laws Neb. 1889, which were to the effect that nothing in the act should be construed to require the docketing of a judgment of the United States court or the

filing of a transcript thereof in any state office within the same county in which the judgment was rendered; but, in view of our construction of existing statutes, we do not deem it necessary to enter upon this field. We are convinced that the judgments of the federal courts, in the county in which they are rendered, are in precisely the same situation as regards liens upon the property of the judgment debtor as judgments of state courts of general jurisdiction.

As to transcripted judgments, this involves sections 8937 and 8939, as above quoted. Appellant contends that under the first section, by the mere filing of a transcript of a domestic judgment in another county, the same became a lien upon the property of the debtor, while under the second section the transcript of a judgment of the federal court did not become a lien until it was *"filed and entered on the judgment record,"* and that, therefore, there is a lack of that exact conformity required to put into effect the act of congress; the result being, as he contends, that the judgment of the federal court is a lien upon all the lands of the judgment debtor throughout the state, and that, therefore, the abstract in question should contain certificates as to liens from every county in the state; or at least, from the records of the federal courts in each federal judicial district of the state, and *amicus curiæ* makes the same contention. The proposition is of considerable force, and its correctness, in all probability, would have to be conceded if the two sections quoted were the only ones to be considered; but we think counsel have failed to give proper weight to this language in section 8937: "And such transcript shall be a lien on the property of the debtor in any county in which such transcript is filed *in like manner as in the county where such judgment was rendered.*" By this language, to determine the quality of the lien of the judgment, we are compelled to inquire under what conditions a domestic judgment became a lien in the county in which it was rendered. Prior to its amendment, sec-

tion 8986, providing for liens of judgments in the county where rendered, was as follows:

"The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be siezed in execution."

The amendment of 1927 merely changed the date of the incipiency of the lien to the date when rendered, and defined the latter. It did not affect the essential condition requisite to the existence of the lien. Prior to the amendment of 1927 this section had been upon the statute books for over forty years, and in *German Nat. Bank v. Atherton*, 64 Neb. 610, we were called upon to construe it with reference to the operation of a judgment as a lien. In that case a judgment had been duly rendered and spread upon the journal of the court, but not entered upon the judgment index, and it was held that as against a subsequent purchaser the judgment did not become a lien until after it had been properly indexed, following *Metz v. State Bank*, 7 Neb. 165. In those cases attention was called to what is now known as section 9509, Comp. St. 1922, requiring clerks of courts of record to keep a judgment record, and providing:

"The judgment record shall contain the judgment debtor and the judgment creditor, arranged alphabetically, the date of the judgment, the amount of the same, and the amount of costs, with the page and the book where the same may be found."

Now, if a transcript when filed in a county other than that in which the judgment was rendered is to be a lien "in like manner as in the county where such judgment was rendered," as prescribed by section 8937, and a judgment in the county in which it is rendered is not a lien until it is

entered upon the judgment index or record, it would seem to follow that the mere filing of the transcript in the other county would be insufficient to constitute a lien, but that, in addition, to acquire that quality, it must be entered upon the judgment record; otherwise, it would become a lien in different manner from judgments in the county where rendered.

If this is the correct interpretation and construction of section 8937, of which we have no manner of doubt, then the words "and entered on the judgment record" in section 8939 require compliance with no other or different condition than is imposed in the case of domestic judgments. Appellant cites the case of *Rhea v. Smith*, 274 U. S. 434, which holds that state statutes governing the liens of judgments of the federal courts must be in *exact* conformity to the laws governing judgments of state courts. The rule so announced is binding upon this court, but the statute of Missouri under consideration in that case was entirely different from the ones we are considering; it attempted to provide that, before a judgment of the federal court should be a lien in the county where rendered, a transcript thereof should be filed in the state court of such county; whereas a state judgment became a lien immediately upon rendition. It is apparent that the ruling in that case is not controlling in this.

We conclude that the laws of this state governing judgment liens of federal courts and state courts are in exact conformity and that the district court was right in sustaining the demurrer to defendant's answer, and that the judgment for the plaintiff should be affirmed.

AFFIRMED.

CLARENCE DINGLE, APPELLANT, V. AXEL H. GILBERT, APPELLEE.

FILED JUNE 22, 1928. No. 26017.

APPEAL from the district court for Burt county: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

W. M. Hopewell and *B. C. Enyart,* for appellant.

J. A. Singhaus, contra.

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

PER CURIAM.

This is an action to recover a real estate broker's commission. The defenses tendered by the answer were, first, the statute of limitations; second, that plaintiff did not procure a purchaser ready, able and willing to buy defendant's land, and that no valid contract for the sale thereof was ever procured by defendant. At the conclusion of all the testimony, the trial court directed a verdict for defendant. Plaintiff has appealed, but in his brief he has totally ignored several provisions of rule 13 of this court. In his brief he fails to state the issues tried in the court below and how they were decided, and there are no assignments of error in the brief.

Because of plaintiff's failure to comply with the rule of the court respecting the preparation of briefs, the judgment of the district court is

AFFIRMED.

CATHERINE M. PAYNE, APPELLANT, V. OSCAR B. CLARK, APPELLEE.

FILED JUNE 22, 1928. No. 25681.

1. Appeal: INSTRUCTIONS. Where instructions to the jury are requested and refused, but the instructions given by the court on its own motion had the same effect as those refused, error does not result therefrom.
2. ———: REMARKS BY COURT. Under the record in this case, error will not be predicated upon remarks made by the court in the presence of the jury, when his attention was not then called to the matter by objection or otherwise, so as to give him a timely opportunity to correct the prejudicial effect, if any.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

R. S. Mockett, H. W. Baird and *Francis V. Robinson,* for appellant.

Comstock & Comstock, contra.

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an action at law by plaintiff to recover of the defendant on three causes of action for money alleged to have been collected and retained by him while acting as her attorney and for certain damages alleged against him. Defendant filed answer and cross-petition praying for judgment for services rendered in addition to those for which compensation had already been received by him. The jury returned a verdict for plaintiff for one dollar and found against defendant on his cross-petition. From an order overruling her motion for a new trial and entering judgment on the verdict, the plaintiff appealed.

The appellant and appellee sustained the relation of client and attorney for nearly three years prior to July 18, 1922, when that relation ceased. He brought and conducted the suit for divorce against her husband in the district court, where she was unsuccessful, and on appeal in this court, where the cause was reversed by an opinion by the commission, adopted August 8, 1921, directing a judgment for absolute divorce and for alimony in the sum of $25,000, payable in ten equal annual instalments with interest at 6 per cent. In addition thereto, her attorney was allowed a fee of $1,500 in addition to all other allowances, to be taxed as costs. The total allowances for attorney's fees appear to have been $1,800. After the judgment was entered as directed, the attorney continued to represent the client in matters relating to the collection of her judgment and in the investment of the proceeds of her divorce suit, until July 18 or 19, 1922, when differences arose between them over money matters and he was discharged. In her first cause of action she charged that he had collected and

received a total of $1,800 as attorney's fee allowed in both courts, that he had retained $500 as fees out of a $2,000 collection on her account on August 13, 1921, and $4,665.24 on or about March 22, 1922; that said amounts were obtained by fraud, deceit and bad faith on defendant's part, and that the total of $6,965.24 constitute an excessive charge for services, by reason of which she prayed for treble damages on the alleged fraudulent items, or a total of $15,948.27, with interest on the first cause. For her second cause of action she alleged that on December 1, 1921, the defendant collected $500, part payment on a $2,000 note given as evidence of that sum loaned for her out of a collection of $2,500 on her alimony judgment on August 13, 1921. On that she asked $523.33 with interest. Her third cause of action was based on the charge that the defendant refused her demands made July 19 and 20, 1922, to surrender to her a will drawn for her by him in June or July, 1921, claiming he had delivered it to her soon after its execution. For this she prayed judgment for $25, as the reasonable cost of drafting another will.

The defendant joined issues by answer and cross-petition. He alleged the engagement by her on and prior to November 21, 1919, to procure a divorce and alimony from her husband, as well as to recover the possession of certain property she owned; that she represented she had no money to pay costs and attorney's fees and that she would, upon obtaining funds, amply and generously compensate him for his services and would reimburse him for advances; that he undertook said work, relying on said promise, and secured the reversal in the supreme court of the judgment of the trial court; that thereafter plaintiff assigned to defendant an amount equal to an interest of 20 per cent. of her recovery in the divorce action and authorized him to collect and enforce the payment; that he brought an equitable action to recover property in Douglas county and secured a settlement on the basis of plaintiff's claim; that he negotiated agreements with regard to several properties in the interest of the plaintiff, advanced

upwards of $1,100, which plaintiff has refused to pay. Defendant traverses the various allegations of the petition, sets up items claimed to be due him amounting to $4,074.88, and prays for an accounting and for judgment. The result was as stated at the beginning of this opinion.

The evidence is voluminous and it is a law case. It was submitted to the jury on conflicting evidence. It will suffice to state such of the evidence as appears necessary in a discussion of the errors assigned.

The 124 errors set up in the motion for new trial have been reduced to 22 in the assignment of errors in the brief of appellant. The first one relates to the second instruction given to the jury in the following language:

"Under the law and the evidence in this case it appears beyond dispute that the defendant received from the plaintiff on and before the 24th day of March, 1922, money and property of the value of $5,165.24 as an attorney's fee in the case of Payne v. Payne, and that he was not entitled to the same because he was fully paid for his services by award of fees made him in the supreme court, and because in any event the contract and assignment upon which he took the said $5,165.24 was void as against public policy unless said fee was given defendant by the plaintiff as an honorarium with full knowledge on her part that she was under no legal obligation to let him have the same and was in full possession of all of the facts in regard to her lawsuit and in regard to what her attorney had done in connection therewith.

"If you find by a preponderance of the evidence that said money and property received by the defendant was such gift or honorarium, and also that plaintiff is not entitled to recover on her second and third causes of action, you should find against the plaintiff upon her petition and proceed at once to the consideration of the cross-petition of the defendant. If on the other hand you find that such money and property received by the defendant was not given him as a mere honorarium or gift, you will find for the plaintiff upon her petition in at least the sum of $5,165.24, with

interest at the rate of 7 per cent. per annum from the 24th day of March, 1922. But of course she cannot have this recovery and also a recovery of triple damages as prayed."

Before discussing this instruction, we desire to call attention to subsequent assignments of error relating to five instructions requested by the court, in which the court was asked to instruct in substance: That an attorney is required to exercise the highest order of good faith and to inform a client of all facts in his possession which might influence the client to enter into or refuse to execute the contract in issue; that assignments or conveyances by client to attorney, while the relationship exists, are regarded with disfavor and are presumed to have been improperly secured; that there is a presumption of unfairness or invalidity attaching to a contract for compensation between attorney and client after the establishment of the relation; that the burden rests with the attorney to show that the contract was fair, just and equitable, and, in the absence of such proof, the transaction should be treated as constructively fraudulent; and, again in varied language, that dealings between an attorney and client are *prima facie* fraudulent.

To comprehend the relation of the instructions thus refused with the instruction given, it is necessary to realize to some extent what the evidence was in the matter of compensation to be made to the attorney for services. There was no agreed fee in advance and thus the implied contract was for reasonable compensation. The courts had evidently allowed as temporary and final attorney's fees a total of $1,800. There was testimony before the jury on behalf of defendant that, after the plaintiff had discussed the matter with others, she had signified an intention to pay him 50 per cent. of the amount realized on the judgment for alimony. On thinking it over, after the allowance of $25,000 alimony by this court, she made up her mind to give him 35 per cent. But by the time they came together to consider the compensation she concluded that 20 per cent. was right and so she made an assignment in writing of

that proportion to him. Omitting the recital of the judgment against her husband and its inducing words, the remainder of the instrument follows:

"Therefore, in consideration of services rendered by O. B. Clark and his counsel to her through all of said litigation and all of her personal matters heretofore arising, the said Catherine M. Payne now assigns to the said O. B. Clark 20 per cent. of all moneys secured by her in the litigation growing out of the divorce action of the assignor against Charles T. Payne, and authorizes the said O. B. Clark to do all things with regard to collection and enforcement of payment of said judgments the same as assignor otherwise might.

"Catherine M. Payne."

The defendant had tried this instant case on the theory that he was entitled, in addition to the court allowances, to one-fifth of all property recovered for the plaintiff from her husband, and that this assignment assured such compensation. The plaintiff was seeking to destroy, in the mind of the jury, the force of the written assignment, and these requested instructions were directed toward that end. The trial court refused the requested instructions, not because they did not express correct rules of law, but because, in the view he took of the case, they did not go far enough. He went further and told the jury that the attorney had been fully paid for his services in the divorce case by the award of fees made in the supreme court. In any event, the court told them, by the instruction complained of, the contract and assignment was void as against public policy unless the fee of $5,165.24 was given by her to the defendant as an honorarium with full knowledge that she was not obliged to let him have it and in full possession of all the facts in regard to her lawsuit and what her attorney had done in connection therewith. Considerable space is devoted in the briefs to a discussion of the significance of the term *"honorarium"* in the instruction. The court evidently was using it in its general meaning of a voluntary donation or gift, as more fully explained

by the context. It seems to us that, if any one is in a position to complain of this, it is the defendant, and not the plaintiff. We do not wish to be understood, by quoting the instruction, to be commending it to be followed in similar cases, but we fail to see how the plaintiff was prejudiced by it or by the refusal to give the instructions offered by plaintiff. The defendant might have built up a more persuasive argument for error in the instruction, had the verdict and judgment aggrieved him. It is a well-known rule that, where instructions to the jury are requested and refused, but the instructions given by the court on his own motion have the same effect as those refused, error does not result therefrom. The doctrine applies here.

The next assignment of error, both in sequence and in importance, relates to alleged prejudicial remarks made by the trial judge. Counsel for defendant was pursuing a line of questions that seemed to be eliciting facts more in relation to the divorce suit than to the case on trial. Counsel for plaintiff objected "to this line of testimony as incompetent, irrelevant, immaterial, and not proper cross-examination." In sustaining this objection, the court made a statement consisting of about twenty lines, when printed. Counsel for plaintiff was perhaps so well satisfied with a favorable ruling on his objection already made that he voiced no objection whatever, as shown by the bill of exceptions, to the remarks of the court made in sustaining his said objection. If he had objected to the particular part of the statement of the court to which he now objects, the court would, in all probability, have withdrawn or modified it. Under the record in this case, error will not be predicated upon remarks made by the court, in the presence of the jury, when his attention was not then called to the matter by objection or otherwise, so as to give him a timely opportunity to correct the prejudicial effect, if any.

We find no other errors assigned that seem to us worthy of prolonging this discussion. On the whole, we are of the opinion that the case was tried with due regard for the rights of both plaintiff and defendant, was fairly submit-

ted to the jury with respect to the rights of the plaintiff, that there is no error in the record, and that the judgment of the district court is right and ought to be and is

AFFIRMED.

RUTH F. DUNBAR, APPELLANT AND CROSS-APPELLEE, V. JOSEPH O'BRIEN, APPELLEE AND CROSS-APPELLANT.

FILED JUNE 22, 1928. No. 26005.

1. **Nuisance:** INJUNCTION. Old lumber maliciously piled on a city lot by the owner for the sole purpose of shutting out the light and air from a neighbor's windows is a nuisance that may be abated by injunction.
2. ———: ———. Whether an injunction against a malicious nuisance should be denied on the ground that the wrongdoer abated it after he had been sued depends on his good faith and the attending circumstances.
3. **Easements.** Adverse user for the statutory period of ten years may create an easement consisting of the right of a lot owner to enter upon a vacant strip of another's adjoining lot and use it for the purposes of painting the former's house on the boundary line, washing windows, and making necessary repairs.

APPEAL from the district court for Otoe county: JOHN B. RAPER, JUDGE. *Affirmed in part, and reversed in part.*

Thomas E. Dunbar and *A. P. Moran,* for appellant.

Paul Jessen, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

ROSE, J.

This is a suit in equity to abate a private nuisance and to protect an easement. Ruth F. Dunbar, plaintiff, owns a lot fronting south on First avenue in Nebraska City. Joseph O'Brien, defendant, owns the adjoining lot on the west. The west wall or the eaves of the house in which plaintiff resides with her family are on the west line of her lot. The east wall of defendant's house is perhaps eight

feet farther west. Neither party disputes the title to the lot of the other. The petition contains pleas that defendant piled old lumber and other debris close to the west wall of plaintiff's house in front of her basement windows, thus shutting out light and air, annoying her and damaging her in her property rights; that in committing the wrongs alleged defendant was prompted by malice with intent to annoy and punish plaintiff without serving any useful purpose of his own; that he maintained the nuisance described months after he was requested by plaintiff to abate it.

It is also alleged in the petition that, by prescription or adverse user for more than the statutory period of 10 years, plaintiff and her predecessors in title acquired an easement consisting of the right to enter and use a strip of ground west of her house for the purpose of washing windows, of placing and removing screens, of painting and of making needed repairs; that a fence prevents access from the rear; that defendant forbade access for any purpose and closed her front passageway by a lattice between the houses.

The relief sought by plaintiff is an injunction abating the nuisances and preventing defendant from interfering with her right to exercise her easement.

The answer of defendant contained general denials of facts relating to nuisances and easements; admitted that he erected a lattice extending from the east side of his house to his east lot line; alleged that plaintiff's basement windows were placed in the west wall of her foundation in September, 1925, and that her workmen then trespassed upon his lot, leaving thereon piles of broken rock and other rubbish which he was required to remove, and that consequently he forbade further trespassing; that any use of his lot by plaintiff or former owners of her lot was by his permission and not by the exercise of any right claimed by them.

The answer contains also a cross-petition alleging that plaintiff collects rain-water from the roof of her house and discharges it in a volume on defendant's lot, thus injuring

the foundation of his house and damaging his fruit and vegetable cave. He prays for the dismissal of plaintiff's suit and for an injunction preventing her from trespassing on his lot and from discharging rain-water thereon.

The facts pleaded by defendant were put in issue by a reply to his answer and by an answer to his cross-petition.

Upon a trial of the issues the district court denied an injunction to prevent defendant from interfering with the passage of light and air through the windows in plaintiff's basement; enjoined interference with an easement consisting of the right of plaintiff to use the strip of ground under her west eaves for the purposes of washing windows, placing and removing screens, painting and making necessary repairs; denied an injunction restraining plaintiff from discharging rain-water from the roof of her house upon defendant's lot. Plaintiff appealed and defendant took a cross-appeal.

Was plaintiff entitled to an injunction to prevent defendant from shutting off the light and air from her basement? The trial court found and the evidence showed that defendant unnecessarily piled old lumber and other debris close to the west wall of plaintiff's basement in front of her windows. The work necessary for this annoyance required defendant to move lumber and other materials from the rear of his lot to plaintiff's windows. If the pile was not intended for a continuing nuisance, the additional work of removing it was necessary and all without any benefit to himself. For several months he shut out light and air from plaintiff's basement after he was requested to remove the obstructions. He allowed the debris to remain there until after this suit was brought. The relief based on this nuisance seems to have been denied by the trial court on the ground that defendant removed the obstructions before the case was tried. The proper inference from the evidential facts is that defendant acted through malice and used his property to annoy and punish his neighbor without serving any useful or æsthetic purpose of his own. The fundamental liberty to own and control property implies the

duty of the owner to respect the equal rights of others. Contrary to a majority of former opinions of the courts the modern view, based on reason and justice, is that the owner of property is not permitted to use it for the sole purpose of inflicting malicious injury upon his neighbor. Referring to the majority rule in cases where the courts declined to interfere with malicious structures, the supreme court of Alabama said:

"The doctrine of these cases, based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and beneficial use of his adjoining property, has been carried to such an extent as in many cases to be justly characterized as 'odious.' And hence statutes have been passed in a number of states abrogating the principle on account of the unjust and injurious effects resulting from its enforcement. The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice, as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands. We have examined the decisions and the reasoning of the various courts upon this question; and, unfettered by any precedents of our own, we are led to the deliberate conclusion that the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice." *Norton v. Randolph,* 176 Ala. 381, 40 L. R. A. n. s. 131.

This is in harmony with the Michigan rule, which has been stated as follows:

"A fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, is a nuisance." *Flaherty v. Moran,* 81 Mich. 52, 8 L. R. A. 183.

Referring to the maxim meaning "So use your own as not to injure another's property," the supreme court of North Carolina said:

"The ancient maxim, * * * *Sic utere tuo ut alienum non lædas,* is not founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said, 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person, in the use of his own property, should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, but solely to gratify a wicked and debasing passion." *Barger v. Barringer,* 151 N. Car. 433, 25 L. R. A. n. s. 836.

The principle applied in the cases cited was adopted by this court March 14, 1914, when the following rule was announced:

"A landowner will be enjoined from erecting a fence on his land to the great damage of his neighbor, and without any useful purpose on his part, but for the sole purpose to annoy and punish the party injured." *Bush v. Mockett,* 95 Neb. 552.

In the present instance there is nothing in the evidence to prove a justification for the creation or maintenance of the obstruction in front of plaintiff's windows. When this suit was brought plaintiff was entitled to an injunction abating the nuisance. Defendant, by his wrongful conduct, caused plaintiff to resort to the district court for equitable relief. Whether the right to an injunction was defeated by the removal of the debris depends on the good faith of defendant. He was prompted by malice in the first instance, and there is nothing in his pleadings or proof to show that he will not repeat his annoyance, if the litigation ends without any restraint upon his future conduct. On this phase of the case the circumstances disclosed by the evidence on all the issues indicate error in the order denying equitable relief.

Did plaintiff prove the existence of an easement permitting access to the west wall of her house and the use of a strip of ground for the purpose indicated?

In *Omaha & R. V. R. Co. v. Rickards*, 38 Neb. 847, the court held:

"An easement in real estate may be acquired by open notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years."

In the present case there is evidence tending to prove the following facts: Plaintiff's house was standing in its present location as early as 1898. For more than ten years continously thereafter owners or occupants of plaintiff's lot had access from the front to defendant's lot and used a narrow strip on the east side of it for the purpose of painting, and washing windows. This use was open, notorious and peaceable without permission of the owners, and after 1925 was first interrupted by defendant, who purchased his lot in 1912 and went into possession in 1913. The easement was continuously exercised by plaintiff and former owners or occupants of her house. On the contrary, there is testimony tending to prove that there was no path in the passageway claimed by plaintiff; that owners of defendant's lot did not have notice at any time that a portion of his lot was used adversely by plaintiff and former owners or occupants of her lot; that any such use was permissive, and not adverse. While the evidence on this issue is conflicting to some extent, the preponderance seems to be in favor of plaintiff, whose easement was acquired before defendant purchased his lot, and not subsequently lost. Defendant testified in effect that the husband of plaintiff requested permission for workmen to make repairs on the west side of her house, but this did not amount to an abandonment of the easement or to an admission that it had no existence. A courteous request by a neighbor for such permission, directed to the owner of the fee, did not necessarily disprove an existing right to enter without it. It is clear that the necessary use of the passageway for plaintiff's purposes would not wear a path. After the ease-

ment was legally acquired, notice of its continuous use was unnecessary. In the decree below the trial court confined the easement to the ground under the eaves. The evidence shows that step-ladders were used, and they seem to be necessary. Their use obviously requires more ground than that covered by the eaves. The width of the easement is determined by necessity, and not by convenience. The former use of a strip to the extent of three feet in width seems to be reasonable and should be protected. The easement does not give plaintiff any right to the fee or to annoy defendant or to litter or injure his lot or to enter his premises for any purpose other than to wash windows, to insert and remove screens, to paint, and to make necessary repairs. For these purposes a passageway two feet wide at the east end of the lattice constructed by defendant will be required.

In so far as the decree below denies an injunction to prevent plaintiff from discharging rain-water on defendant's lot, it seems to be correct, and to that extent is affirmed. Otherwise, the judgment of the district court is reversed and the cause remanded for the purposes of a supplemental decree conforming to the views herein expressed, the costs in both courts to be paid by defendant.

JUDGMENT ACCORDINGLY.

SARAH E. MUNSELL ET AL., APPELLANTS, V. CITY OF HEBRON, APPELLEE.

SHELDON S. ROUSE, APPELLANT, V. CITY OF HEBRON, APPPELLEE.

FILED JUNE 22, 1928. NOS. 25600, 25601.

1. **Municipal Corporations:** SPECIAL ASSESSMENTS. Special assessments for paving by a municipality upon privately owned property for the public benefit in excess of the benefits to the owner of the property so assessed are unauthorized.
2. ———: ———. The owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or

such reasonably prospective benefit as such owner may derive from the improvement in question.

3. ———: ———: BURDEN OF PROOF. When a party attacks a paving assessment as void in a city of the second class having a population under 5,000, the burden is on him to prove the invalidity of the assessment. *Whitla v. Connor*, 114 Neb. 526.

4. ———: ———: IRREGULARITIES. "Special assessments for improvements," under section 4286, Comp. St. 1922, cannot be enjoined for lack of jurisdiction on the ground of mere technical irregularities in the manner of making the levy. *Biggerstaff v. City of Broken Bow*, 112 Neb. 4.

5. ———: ———: ———. "Where a city council, acting within its jurisdiction and exercising properly delegated power, assesses property for the benefits of paving, mere irregularities in the proceedings do not necessarily invalidate the assessments." *City of Superior v. Simpson*, 114 Neb. 698.

6. ———: ———: SPECIAL BENEFITS. "The vital principle underlying special assessments is that the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax without a corresponding increase in value is to take private property for public use." *Schneider v. Plum*, 86 Neb. 129.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed, with directions.*

Richards & Richards, for appellants.

Walter C. Weiss, Harvey W. Hess and *Peter I. Harrison, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

DEAN, J.

Hebron, in Thayer county, has a population of a little over 1,500 inhabitants. Zeriah B. Munsell and Sarah E. Munsell, husband and wife, and Sheldon S. Rouse, hereinafter called plaintiffs, own certain city real estate situate in paving district No. 1 in Hebron. The Munsell real estate was taxed and assessed, under a special paving assessment, for $3,180.72, by the Hebron city council for cer-

tain city street paving improvements adjacent to the Munsell property, and the Rouse property was likewise taxed and assessed in the sum of $2,115.41, for like paving improvements adjacent to his property. On appeal to the district court the special assessments were affirmed and judgment was rendered pursuant thereto. The plaintiffs, alleging error, have brought the record here for review.

The Munsells have no interest in the Rouse property, nor has Rouse any interest in the Munsell property. On submission of the record to this court all plaintiffs joined in a single brief. The defendant city's brief relates to both the Munsell and the Rouse property under a stipulation which provides that both actions "may be briefed and submitted together and treated in all respects as one appeal."

The plaintiffs contend that the above several assessments are excessive under the facts and the law. The Munsells and Rouse each filed separate petitions in the district court, but the petitions so filed, in substance and effect, are practically identical, except as to the names of the plaintiffs, the descriptions of their respective properties, and the amount of the respective assessments, and the like.

The Munsell property consists of about 13 acres, which is divided into two separate tracts, one of which is owned by Mrs. Munsell and the other by her husband. The only improvements on the land are the house, barn, and outbuildings. The Munsell tract, however, is connected with the Hebron sewerage system. The Rouse property is not so connected. But all of the properties involved in this suit are on the outskirts of the town and it appears that none of the land involved herein is plotted nor is it divided into lots. Plaintiffs Munsell insist that their land is not suited for residential purposes in part on account of a draw thereon which would require grading and filling. All plaintiffs take exceptions to the paving assessment, and this in large part on account of the remote location of their land from the central or main part of the business section of Hebron.

The Rouse property has a paving frontage of about 417 feet and consists of about four acres. This property is lo-

cated opposite the Munsell property. A house and barn and other outbuildings are on the Rouse property. The evidence tends to prove that it would be practicable to locate another residence on the Rouse tract. But the Munsells and Rouse all contend that there is now no demand for any of the land of the parties plaintiff for residential or business purposes. An engineer employed by the city testified in part: "Q. Do you figure that the benefit in any case could be less than the cost of paving? A. No. Q. And the proposed assessment as you have prepared it for the city council is based purely and simply on the cost of the paving in front of each piece of property? A. Yes." The defendant city however in its brief observes that "it is clear that the engineer simply acted as a * * * technical expert for the city council in preparing this tentative schedule."

In support of their argument the Munsells and Rouse cite section 6, art. VIII, of the Constitution of Nebraska. This section, so far as applicable to the facts, follows:

"The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property benefited."

Clearly the council did not follow certain of the provisions of section 4286, Comp. St. 1922, which, among others, contains the following recitals in respect of municipal assessments:

"First. Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same, which, with the vote thereon by yeas and nays, shall be spread at length upon the minutes."

The plaintiffs produced five or more witnesses, and their evidence supports the plaintiffs' contention that none of the tracts involved herein are plotted nor divided into lots,

and that both tracts, owing in large part to their location on the outskirts of the town, are not available, under present conditions, for the erection of town residences thereon, but are suitable mostly for truck farming, poultry raising, and the like. The witnesses produced by plaintiffs testified in substance that the Munsell property was worth from $6,500 to $7,500 before the paving was constructed and that the value was enhanced by the paving $500 to $1,000 or thereabouts. And in respect of the Rouse property the evidence fairly discloses that it was worth from $7,000 to $8,000 before the paving and that the paving enhanced its value in an amount not to exceed from $500 to $1,000. From the record it appears to be fairly established that the plaintiffs come within the meaning of section 4286, above cited, and the decisions. The plaintiff Rouse was called as a witness by the defendant city and aside from him the city produced no witnesses.

The facts herein are not new in this jurisdiction. In a recent case we said that, where a party attacks a paving assessment as void in a city of the second class having a population under 5,000, the burden is on him to prove the invalidity of the assessment. *Whitla v. Connor,* 114 Neb. 526. In 1878 Omaha constructed a sewer in the channel of an adjacent creek at a cost exceeding $30,000 and imposed a special assessment on all the real estate in the sewer district for its payment. The district court affirmed the proceedings, but on appeal to this court, in a well-considered opinion by Maxwell, C. J., the judgment was reversed on the ground that special assessments could only be levied upon adjacent property specially benefited, and only to the extent of the benefits. *Hanscom v. City of Omaha,* 11 Neb. 37. And we have held that "special assessments for improvements," under section 4286, Comp. St. 1922, cannot be enjoined for lack of jurisdiction on the ground of mere technical irregularities in the manner of making the levy. *Biggerstaff v. City of Broken Bow,* 112 Neb. 4.

"Where a city council, acting within its jurisdiction and exercising properly delegated power, assesses property for

the benefits of paving, mere irregularities in the proceedings do not necessarily invalidate the assessments." *City of Superior v. Simpson*, 114 Neb. 698. See *Broghamer v. City of Chadron*, 107 Neb. 532.

"The act of a city in ordering the paving of a street and the assessment of the cost on abutting property is a legislative determination (a) that the improvement is expedient and proper and (b) that the abutting property will be benefited. Courts do not review legislative acts performed in a regular and statutory way. It follows that the cry of over-assessment will be entertained by the court,— not a denial of any assessment. * * * Benefits capable of instant demonstration and mathematical accuracy are not necessary in order to support an assessment." *Chicago, R. I. & P. R. Co. v. City of Centerville*, 172 Ia. 444.

In *Schneider v. Plum*, 86 Neb. 129, at page 131, in an opinion by Root, J., this is said: "The vital principle underlying special assessments is that the value of the property taxed has been increased in a sum at least equal to the assessment levied. To levy a tax without a corresponding increase in value is to take private property for public use."

The assessment of taxes by a municipality upon privately owned property for the public benefit, without payment for such assessment, in excess of the benefits to the owner of the property assessed, is a usurpation of power. In other words, the owner of property in a municipality cannot lawfully be assessed for a public improvement thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question. From the evidence in the present case, in respect of benefits, and the law applicable thereto, it appears to us that the levy of the assessment and the action of the city council complained of, in respect of such excess only, is an arbitrary exercise of municipal power.

From the meager testimony introduced in respect of the benefits we are of the opinion that a fair estimate of the

benefits to each tract does not exceed the sum of $1,000 and that the respective assessments should be reduced accordingly. The judgment of the district court is therefore reversed and the cause is remanded, with directions that the assessments be made pursuant to the views above expressed.

REVERSED.

IN RE ESTATE OF JAMES COMBS.
JEREMIAH COMBS ET AL., APPELLANTS, V. HARRIET SUSANNAH MUMFORD ET AL., APPELLEES.

FILED JUNE 22, 1928. No. 25456.

1. Wills: CONSTRUCTION. No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property.
2. ———: ———. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it.
3. ———: ———. The language, "I hereby direct that my estate both real and personal, remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," construed, and *held*, by implication, to exclude such wife as a devisee of the remainder, and to designate the heirs of the blood of the deceased testator as the devisees intended.

APPEAL from the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Reversed, with directions.*

G. L. Godfrey and *J. L. McPheely*, for appellants.

Lewis C. Paulson, Chappell & Wilson and *King & Bracken, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and HOWELL, JJ., and BEGLEY, District Judge.

EBERLY, J.

By appropriate pleading in the form of an action to construe a will, the following situation is presented: The deceased, James Combs, a resident of Nebraska, died April 7, 1919, leaving a widow, but having no children or descendants. He owned, at the time of his death, a home consisting of two lots and a dwelling situated thereon in which he and his wife resided, and also personal property. His wife had children by a former marriage. The testator's "heirs of the blood" consisted of brothers and descendants of deceased brothers.

Combs' will was admitted to probate on petition of the widow. It contained the following provisions pertinent to the question before us: (1) That debts should be paid out of personal property, and if this be insufficient for the purpose contained, there should be the sale of "so much of my real estate as may be necessary for that purpose;" (2) a bequest to his wife of the "use, income and occupation of all estate, both real and personal, during her natural life;" (3) that the bequest of all money on hand or in bank at the time of his death to his wife was to be absolute.

The third paragraph of the will is as follows: "It is my wish and I hereby direct that my estate both real and personal, remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska."

The real question presented is: Does the term "my legal heirs," as thus used, embrace and include the widow of the testator?

It may be said that, under the provisions of section 1226, Comp. St. 1922, the widow possessed the undoubted right to elect within one year whether she would take the "lands so devised, or the provision made for * * * her in the last will," or take under the terms of the statute of descent. In the instant case, the widow failed to exercise this right within the time and in the manner provided, and came squarely within the terms of section 1227, Comp. St. 1922, whereby she is conclusively deemed to have elected to take

the real estate devised or other provision made by the last will and testament.

This right of election is personal and does not pass to the heirs. *Fergus v. Schiable,* 91 Neb. 180.

It is conceded that the real estate involved in this controversy was the homestead and occupied by the testator and his family at the time of his death.

Section 2832, Comp. St. 1922, provides that, where the homestead is selected (as in this case) from the husband's estate, "it vests on" his death in the surviving widow for life, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will.

It would seem that the sections of our statutes heretofore referred to dispose of this case with little difficulty. It is plain that the husband cannot cut off his wife by will unless she consents. The law sanctions his right to will all of his property, or any part of it, to his surviving wife, subject only to such conditions over which she has complete control. Only such property as the will does not dispose of descends to his heirs. The wife, under the circumstances of this case, must take as one or the other; that is, as devisee or as heir, not both. The last clause of section 1226, Comp. St. 1922, so states, "unless it plainly appears by the last will and testament of the deceased to have been so intended by the testator." It follows that in the case before us the words of the will constitute the measure of the widow's rights and which, under its terms, is acquired by her as a devisee only.

It thus becomes a matter of mere construction of terms employed. Wills are to be construed according to the reasonable intent of the testator as evidenced by the language of the will, giving to the words their ordinary meaning. *Harris v. McPherson,* 112 Neb. 410.

No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No

particular words, no conventional forms of expression, are necessary to make an effective testamentary disposition of his property. The court, without much regard to the canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *Albin v. Parmele,* 70 Neb. 740; *McCulloch v. Valentine,* 24 Neb. 215; *Lesiur v. Sipherd,* 84 Neb. 296; *Heywood v. Heywood,* 92 Neb. 72; *Draper v. Eager,* 112 Neb. 611.

All parties to the litigation fairly agree that the will, in plain, unmistakable terms, vested in the widow a life estate in the real estate and in the personal property of which the testator "died seised," and also provided for an absolute gift to her of "all money on hand or in bank." At this point the agreement ends. It would seem, however, that this instrument just as definitely indicates as the ultimate devisees of the real estate and personal property involved, after the wife's death shall terminate her life estate or interest therein, persons of whom the words, "my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," are descriptive. It must be admitted that the term "my legal heirs" construed, in the light of surrounding circumstances, with reference to all of the language employed in the will, must be relied upon to designate the ultimate devisees, the ultimate remainderman. It would seem that the fact that the testator desired to dispose of the title to his property to the exclusion of his wife with her consent by will indicates that he did not desire to have it come back to her after his death for distribution to her heirs. It appears absurd to conclude that the testator intended to give her only a life estate living, and after her death cast a fee simple title on her, dead. Had he wanted his widow to share in his property as a remainderman to the partial exclusion of his heirs of the blood, it would have been easy to have evidenced such intention by use of appropriate words. This he failed to do.

It must be remembered that we are bound to give due

effect, if possible, to all the language employed in the will. The words, "in equal shares in accordance with the laws of descent and distribution of the state of Nebraska," are manifestly inconsistent with the wife's receiving a vested interest, as a remainderman, of one-half of the estate then passing by the will. The words quoted carry the sense of a limitation or exclusion. If, in fact, two classes of persons exist, to one of which the words employed and quoted apply strictly and as an entirety, and to the other class have only a partial application, it would seem logical that only the class to which they apply as an entirety would be within their proper purview. If this be true, it follows that "my legal heirs" is descriptive of a class, identified by the terms of the will as the devisees intended, and identical with the class of persons who, in the event of intestacy, would have inherited the subject of the present devise under the laws of Nebraska in equal shares. Obviously, the wife or widow was not one of this class, for here, if she inherits at all, she inherits one-half of this estate. This, in turn, leaves, as the sole persons to whom the words "my legal heirs" (who would inherit in equal shares) apply, those who were heirs of the testator's blood at the date of his death, viz., his brothers and their descendants, and as such they are entitled to inherit.

The conclusion is that, in view of the language employed in the will, the subject-matter to which the will relates, and the circumstances surrounding the execution of the instrument, the term "my legal heirs," as employed therein, designates only the heirs of the blood of the testator, and in them is thereby vested the estate of remainder.

It follows that the judgment of the district court construing the will in question must be, and is, reversed, with directions to enter a judgment in accord with the conclusion of this opinion.

REVERSED AND REMANDED.

NEBRASKA STATE BANK OF VALPARAISO, APPELLANT, V. O. J. MAY ET AL., APPELLEES.

FILED JUNE 26, 1928. No. 26012.

1. **Record** examined, and found that the verdict of the jury is amply supported by the evidence and the law applicable.
2. **Appeal.** "The theory adopted at the trial as to the issues will be followed on appeal." *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490.
3. **Estoppel.** Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss.
4. **Instructions** given considered, and found to correctly state the law pertinent to the issues.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

J. Lloyd McMaster and *H. N. Mattley*, for appellant.

George I. Craven, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

THOMPSON, J.

In this action the plaintiff, appellant, sought recovery on two promissory notes, signed by defendants, appellees, apparently as makers. The petition was in usual form. Default was entered as to defendant May, and defendant Haack interposed the defense that he was but a surety on the notes, and that by reason of certain stated obligations resting on the plaintiff, payee, by it uncomplied with (such as procuring to be filed in the proper counties certain chattel mortgages), he as such surety had been released. To this answer plaintiff interposed a general denial, followed by a plea of facts which, if found to be true, would amount to a waiver, if not a complete estoppel. Trial was had, verdict and judgment rendered in favor of plaintiff as against defendant May, and against the plaintiff as to

defendant Haack, to reverse which latter plaintiff appeals.

In substance, the claimed errors relied on for such reversal are: That the verdict of the jury is without evidence to support it, and is contrary to law; that the court erred in refusing to give the instructions tendered by the plaintiff, and erred in giving certain other instructions on its own motion; and the court further erred in refusing to grant a new trial on grounds of accident and surprise.

To quote a part of the evidence would serve no useful purpose, and to quote it in its entirety would be to unduly extend this opinion. However, it might be well to state that from it we find: That appellant is the successor of the Farmers State Bank of Agnew, Nebraska, and as such succeeded to its interest in the notes here involved, and hence the case stands, under the record, as if the action were one between the original parties to the instruments in question; and the case is governed by section 4669, Comp. St. 1922, which provides in part: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable." We further find: That the jury were warranted in concluding that Haack was but a surety on each and every of the notes disclosed by the record as having been given by May; that each and all of such notes, save the first, was a renewal note; that, at the time of the execution and delivery of the respective mortgages given to secure these notes, the property covered thereby was permitted to remain in the possession of the mortgagor; that plaintiff failed and neglected to procure these mortgages, or certified copies thereof, to be filed in the county in which the mortgagor resided, as provided by statute, and as under the facts alleged and proved it was its duty to do; and that by reason of such failures the property mortgaged passed into the hands of innocent purchasers for value, and was lost to Haack, to his damage in an amount equalling the face of the notes with interest added.

Section 2550, Comp. St. 1922, so far as material to this case, provides: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides."

The case having been tried on the issues tendered by the pleadings, our determination here necessarily is so limited. *Norton v. Bankers Fire Ins. Co.*, 115 Neb. 490. This theory as to the issues is proved, not only by the pleadings, the evidence, and the instructions offered by plaintiff, but also by the instructions given. Thus the main issue was one of fact, rather than one of law. The evidence in many material instances, as between that of plaintiff and that of defendant, is acutely contradictory; hence, the jury's determination of such disputed facts is final. Further, it is a wholesome rule that, where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss. By analogy this conclusion finds support in *Berkovitz v. Morton-Gregson Co.*, 112 Neb. 154, and cases therein cited.

Applying the law to the evidence, we are led to conclude: That the verdict of the jury is right, and should not be disturbed; that the instructions given correctly state the law applicable, and error was not committed in giving the same, or in refusing to give the instructions tendered by plaintiff; further, that the court did not err in denying a new trial on grounds of accident or surprise.

The judgment of the trial court is

AFFIRMED.

ANNE K. YATES, APPELLANT, V. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

FILED JUNE 26, 1928. No. 25228.

1. Insurance: ACTION ON POLICY: DEFENSES. Where an insurance company, before being sued, as in this case, bases its refusal to pay life insurance to the beneficiary solely upon the ground that the policy had lapsed before the death of the insured, it will not be permitted to assert other and different defenses after litigation is begun.
2. ———: ———: ———: ESTOPPEL. In such case, where the answer of the insurance company sets up a different ground of defense than that given as a reason for nonpayment of the policy, and no reply is filed, but the action is tried as though there was a reply, if facts showing an estoppel are admissible and admitted for other purposes, it is not necessary that estoppel be specially pleaded.
3. ———: POLICIES: CONSTRUCTION. Life policies written by insurance companies are to be construed most strongly against them.
4. ———: ———: INCONTESTABILITY. An incontestable clause in a life policy, "After one year from the date of issue, this policy shall be incontestable except for nonpayment of premiums," means what it says, and time for contest begins to run from the "date of issue."
5. ———: ———: ———. An incontestable clause in a life policy is for the benefit of both insured and beneficiary, and applies before and after the death of insured.
6. ———: ACTION ON POLICY: PLEADING. It is not necessary to specially plead an incontestable clause in a life policy when it is attached to, and made a part of, the petition.
7. ———: ———: DEFENSES: ESTOPPEL. It appearing from the pleadings and evidence that the company made no contest, of any sort, of the policy in suit, for more than eight years after the "date of issue," it cannot now make the defense of suicide or that insured came to his death by his own hand or act.
8. ———: ———: ———: ———. It appearing, when plaintiff demanded payment of the policy, the company refused the same for the sole reason that the policy lapsed for nonpayment of premiums before the death of insured, it cannot now defend on other or different grounds, of which it had knowledge as being actual or probable.

9. ———: ———: QUESTION FOR JURY. Death of insured being admitted in the company's answer, and whether the policy had lapsed during his life for nonpayment of premiums being the only defense available, it was error for the trial court to withdraw the case from the jury.

10. ———: ———: ———. Under the pleadings and evidence, the jury should have been permitted to determine whether insured died while the policy was in force.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Frank C. Yates and *Nelson C. Pratt,* for appellant.

C. J. Baird and *L. C. Hupp, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE, District Judge.

HOWELL, J.

This is an appeal from a judgment of the district court for Douglas county, dismissing plaintiff's cause of action. Appellant was plaintiff, and the parties will hereafter be referred to as plaintiff and company.

The action was based upon a policy of insurance for $2,000, issued June 14, 1913, to John B. Lindsey, husband of plaintiff, she being named as beneficiary.

At the close of plaintiff's testimony, the company moved for a directed verdict. The court sustained that motion, discharged the jury and ordered plaintiff's action dismissed.

The pleadings have given us some trouble, and we deem it necessary to analyze them by paragraphs.

Paragraph 1 of the petition alleges the corporate entity of the company; the issuance of the policy to John B. Lindsey on June 14, 1913, a copy of the policy is attached to the petition, and made a part thereof, and its acceptance by Lindsey, *"now deceased,"* at Omaha. Paragraph 1 of the answer admits those allegations.

Paragraph 2 of the petition avers that Lindsey resided in Omaha and paid all dues required to keep the insurance

in force to and including January 14, 1915. Pargraph 2 of the answer admits the residence of Lindsey, concedes the insurance was in force to January 14, 1914, and denies payment of dues beyond that date.

Paragraph 3 of the petition alleges that, about April 13, 1914, Lindsey was employed and resided in Omaha, disappeared at that time and has not since been heard from. Paragraph 3 of the answer denies those allegations for want of sufficient information to admit them. Having admitted Lindsey's death, in paragraph 1, there is little, if anything, left of paragraphs 3 of the petition and answer.

Paragraph 4 of the petition alleges the plaintiff was the wife of Lindsey; vigilant efforts to find him; inability to trace him; his absence for seven years, and his death about April 13, 1914. Paragraph 4 of the answer states lack of information to admit, and therefore denies, those allegations. Affirmative matters of defense are alleged: (1) Lindsey died, if dead, "by his own hand or act" within one year from the date of the policy; (2) no proof was furnished of the death of Lindsey; and (3) a tender of premiums paid.

The only tender made was the offer in the answer. It was not actually made or kept good, and was offered only "in case proof should be furnished of his death as alleged in the petition." There was no allegation in the petition that Lindsey died by his own hand, or act, or suicided. As stated before, his death was admitted, and it only remained to be shown when it occurred, and not necessarily how it occurred. The denial was, death did not occur about April 13, 1914. By turning to paragraph 5 of the answer, it will be observed the company alleged the policy "had not been in force" one year, "and the first year's premium had not been paid," by reason of which, "said policy lapsed."

Paragraph 5 of the petition alleges the policy was in force at "the date of death of said John B. Lindsey;" plaintiff advised the company of the death and offered to make proof, and had submitted proof thereof; demanded payment, and the company "failed, refused and declined" to

pay. Paragraph 5 of the answer denied the foregoing, and alleged the issuance of the policy on June 14, 1913, "in consideration of the application" for the insurance, "and of the payment of the advance annual premium of $55 together with the sum of $12.04 for temporary insurance to January 14, 1914," the payment of future like annual premiums, and "defendant agreed to pay, upon proof of his death, to his wife, Anne K. Lindsey, the sum of $2,000;" except the $12.04 for temporary insurance to January 14, 1914, the required premiums were not paid; in case of nonpayment of any premium when due within the first three years, the policy shall cease and all rights forfeited; that the policy had not been in force for a year at the time of the alleged death, and the first year's premium had not been paid, because of which the policy lapsed; "that more than five years have elapsed since the alleged cause of action accrued, and the same is barred by the statute of limitations."

Paragraph 6 of the petition and the answer are merely formal, the answer including a general denial.

When the case was called for trial, the company was permitted to amend its answer by interlineation, and plaintiff was given leave to file reply. A jury was at once drawn and the trial proceeded without a reply being actually filed. Thus, the issues were permitted to loosely stand. So far as the record goes, issues the reply might have presented, or that were assumed, were not limited. No objection was made to any testimony as not being within issues. The field was open to plaintiff so long as the company acquiesced, as to any issue available within the proper functions of a reply, and the evidence properly received.

Pruned to crux, the petition declares that plaintiff's husband died about April 13, 1914, having insurance with the company for $2,000 in full force, evidenced by a policy issued June 14, 1913, naming her as beneficiary, and the company owed her the money.

The company admitted such a policy was issued, that insured was dead, and it had not paid the policy.

To avoid payment, the company set up four grounds of defense; (1) The policy lapsed for nonpayment of premiums before insured died. (2) Insured committed suicide. (3) No proof of death had ever been furnished the company. (4) The claim was barred by the statute of limitations. As we read the evidence and the pleadings, there is but one controlling ultimate question to be determined, and that is: Did the insured die within one year from the date of the policy, and before it lapsed for nonpayment of premiums?

At the trial two letters were received in evidence, which were objected to by the company for the reason they were "incompetent, irrelevant, immaterial, no foundation laid." No objection was made because they were not within the issues. The trial court was not asked to, nor did it, rule on that question. One letter was written May 3, 1921, by plaintiff's attorney to the company, saying: "We * * * hereby make demand upon you for the payment of the benefits under this policy. You will please prepare proofs of death and send same to us to be filled out. This is to inform you that John B. Lindsey disappeared on the 13th day of April, 1914; that he has not been seen or heard of, and the circumstances surrounding his disappearance are such as to be very strongly presumptive of his death. * * * You will please give some attention to this matter within the next ten days, as we have been authorized by our client that, unless action is taken by the company for the payment of the benefits under this policy, to immediately institute suit." The other letter was written May 16, 1921, by the company to the attorney, saying: "Replying to your letter of May 3, company advises us that policy No. 264010, on the life of John B. Lindsey, lapsed for nonpayment of the six months' note of $14, given in part payment of the first premium and became due July 14, 1914, and has no value."

This action was commenced December 7, 1921. At the time the company wrote the letter of May 16, 1921, every defense it sought to interpose by answer was complete, if

good, and known to it, including limitations. In *Mitchell v. Brotherhood of Locomotive Firemen and Enginemen*, 103 Neb. 791, it is said:

"Defendant knew of the statements made in the application. It was also advised, before it promised to pay the loss when proofs were furnished, of the fact a witness had testified before a special master in United States district court, that decedent had received an injury in a railroad wreck on December 5, 1905, that he was operated upon, a portion of his skull removed, and a silver plate placed over the opening, and had since suffered from dizzy spells and epilepsy. This was sufficient notice of a probable defense, and if it desired to assert it, it should not have put its refusal to pay upon the other ground only. We are of the opinion that defendant is estopped to defend upon the ground set up in the amended answer."

Had the company furnished the blanks for proofs as requested, it would have learned all the facts. Its reply to plaintiff was, in effect, the company is not concerned about how the insured died or when he died, because the policy lapsed for nonpayment of the premium note which "became due July 14, 1914." Whether the reason was a good one, or bad, it precluded itself from setting up another after litigation started.

Powers v. Bohuslav, 84 Neb. 179, Good, C., now an honored member of this court, was dealing with a suit for commissions on a brokerage contract for the sale of land. The broker secured a purchaser, and the landowner refused to convey the land, giving a certain reason therefor. When sued, he set up another and different defense. On page 184, the court said: "Defendant, having failed to object upon the ground that the purchaser was willing to pay all cash, instead of deferring a part of the purchase price, until after litigation was instituted, will not now be heard to make such defense." In that case, the reply was a general denial, and no estoppel was pleaded.

In *Hilmer v. Western Travelers Accident Ass'n*, 86 Neb. 285, 291, this court, speaking through Root, J., with ref-

erence to another case in this court, in which the insurance company denied the policy was in force, said: "The company also urged a defense based upon an agreement in the policy. Manifestly it was not just to permit the company to insist that the policy was void for one purpose and valid for another." Further in the opinion, on page 292, it was said: "But, if a person before suit refuses to satisfy a demand for particular reasons stated by him to the plaintiff, he will not be permitted after litigation has commenced to change his ground and defend upon entirely different considerations."

Strictly speaking, inconsistencies of the kind we are talking about are not to be said to fall under estoppel or election. They partake of both, but it seems to be a rule of procedure based upon manifest justice. 10 R. C. L. 698, sec. 26.

The letters were material and relevant to issues before the court for other purposes than estoppel. The proper rule, in such case, is well stated in *Hirsch Rolling Mill Co. v. Milwaukee & F. R. V. R. Co.*, 165 Wis. 220, in these words: "However, if the facts showing the estoppel are within the issues made by the pleadings and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel should be specially pleaded." In view of the fact that the instant case was tried without a reply as though one was filed, and that the two letters were in evidence on other issues, it is rather technical to hold plaintiff to strict rules of pleading. The facts, being properly before the court, should not be ignored. We have recently held, in *Northwest Ready Roofing Co. v. Antes, ante*, p. 121, that technicalities will not be permitted to work injustice.

What has been said disposes of failure to furnish the company with proofs of death. In addition, however, it may be said, a total denial of liability under the policy automatically disrupts that defense.

The next defense urged is suicide.

The policy, a copy of which is attached to the petition,

contained two clauses, in the order copied, as follows: (1) "If the insured, whether sane or insane, shall die by his own hand, or act, within one year from the date hereof, this policy shall be void and shall have no value; but in such event the company will return the premium paid." (2) "After one year from the date of issue, this policy shall be incontestable except for nonpayment of premiums."

Preliminary to discussing these provisions, attention is called to the last sentence in paragraph 4 of the company's answer, which reads: "Further answering, tenders a return to the plaintiff of the premium paid in case proof should be furnished of his death as alleged in the petition."

Aside from the fact that the tender pleaded is not unconditional, depending upon the furnishing of proofs of death which the company had waived, it was conceded at the oral argument that no actual tender had been made. Much has been said in argument about inconsistencies in the answer. We do not care to discuss that point. We will assume the several defenses have been sufficiently pleaded. The company is in no position to claim suicide, since it has at all times denied the proof was sufficient to show death. From its standpoint, it cannot claim, on this appeal, the benefits of the suicide clause. It obtained the decision of the trial court on other grounds and has not itself appealed.

The suicide and incontestable clauses in the policy must be construed together. The suicide clause is limited to one year. The incontestable clause is so plain that it is not open to construction. It presents a matter of simple arithmetic. Take the date of the issuance of the policy from the date of the time the company enters a contest, and the difference will show whether it is one, more, or less than one year.

The company wrote the contract and sold the insurance on its own terms. It was free to limit or eliminate time for contesting the policy. We are not concerned with the meaning of the word "contest," since the company at

no time questioned the policy by notice, suit, or otherwise, until May 16, 1921. It is no answer to say the company was not sued nor claim made within one year. If it desired to contest, it must have done so within one year. The company has no right to require an insured, or beneficiary, to assert a claim at such time as will benefit it, or to sue in time for it to answer within the year.

It has been contended in other cases that incontestable causes do not relate to deaths occurring during the restricted period, and that it is only when insured dies thereafter that the obligations of the policy become absolute. This is answered in *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 176: "The argument is ingenious but fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy. It is true, as counsel for petitioner contends, that the contract is with the insured and not with the beneficiary, but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary. * * * 'The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime. The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured.' In order to give the clause the meaning which the petitioner ascribes to it, it would be necessary to supply words which it does not at present contain. The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; not that it shall be incontestable after two years if the insured shall live, but incontestable

without qualification and in any event." Further on in the opinion, it was said: "Dealing alone with the provision here under review, we are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed." In that case, the contestable period was exceeded by only one day, when the insurance company took the first action to avail itself of protection.

The *Hurni* case was followed in *Great Southern Life Ins. Co. v. Russ*, 14 Fed. (2d) 27, where it is said the following are not open to debate: "(1) That the incontestable clause is valid: * * * (2) That the clause is to be construed liberally, and as covering false representations and fraud on the part of the insured: * * * (3) That, where the policy provides that it shall be incontestable after stated time from 'date of issue,' the time for contest begins to run from the date of the policy. * * * (4) That the clause inures to the beneficiary of the policy and applies even where the period elapses after the death of the insured." Each foregoing proposition is fortified with many citations. It was held an answer, filed after the period stated for contest in an action instituted prior thereto, was too late, did not relate back and stated no defense.

Why should the law not be such? The contract was written and sold by and on the company's own terms, at a price it fixed. It had the benefit of the premium and, in refusing to pay, asks the courts to give it relief from its own solemn engagements. It had the right to contract itself into a pocket and, having made the sale, should be required to respect and fulfil its part. The company's counsel claim that, if insured suicides within a stated time fixed in the policy, the company will not be held liable, and cite *Miller v. National Council, K. & L. of S.*, 109 Neb. 199, and *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488. The latter case does not touch the question. The *Miller* case relates to a by-law limiting liability to one-fifth of the contract in the event of suicide within

two years, has nothing to do with an incontestable clause and is not in point.

Without casting doubt upon the foregoing, there is the other reason that the company is precluded from asserting suicide as a defense. It denied liability solely on the lapsing of the policy. What we have said as to the defense of the statute of limitations applies with equal force to suicide.

This leaves the only defense open to the company. That Lindsey was dead when this action was instituted is admitted. Whether the policy had lapsed when he died is a question of fact. Whether he died by his own hand, or act, is immaterial except to determine whether he died, as alleged in plaintiff's petition, about April 13, 1914. We are not impressed that the evidence was sufficient to go to the jury on death from tuberculosis, but do not foreclose further proof on that issue, if there be any. We think, and it was frankly so conceded by counsel for the company at oral argument, the evidence is sufficient to call for a jury determination on the questions: When did the insured die? and, was the policy then in force? In withdrawing those questions from the jury, the learned trial judge was in error.

The second headnote in *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, cited by company's counsel, stated the rule that, after seven years, an absentee is presumed dead, but there is no presumption that death occurred at any particular time. Notwithstanding the great learning of the judge who presided at the trial of this case in the district court, we cannot dissuade ourselves from a conviction that the judgment is erroneous.

We have examined, with great care, the propositions of law presented by counsel for the company, each of which might well be conceded. They do not deal with the entire situation, and are only applicable when the entire question is segregated into parts.

The judgment of the district court is reversed for a new trial in keeping with this opinion.

REVERSED AND REMANDED.

COLFAX COUNTY BANK, APPELLEE, V. EMIL KONVALIN ET AL., APPELLANTS.

FILED JUNE 26, 1928. No. 26067.

1. **Witnesses: COMPETENCY.** The grantee of a deceased person is the latter's legal representative as against an attacking creditor, seeking to set aside the conveyance as fraudulent.
2. **Fraudulent Conveyances.** In an action to set aside a fraudulent conveyance based on a consideration of past-due indebtedness, evidence *held* insufficient to show existence of valid debts.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

M. F. Harrington and *Clifford B. Scott*, for appellants.

Douglas Cones and *M. H. Leamy, contra.*

Heard before ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and BEGLEY and REDICK, District Judges.

BEGLEY, District Judge.

This is a creditor's bill brought by Colfax County Bank against Frank Konvalin, Anna Konvalin, his wife, and Emil Konvalin and Agnes Konvalin, his wife, to set aside as fraudulent a certain conveyance of real estate in Pierce county, Nebraska, executed by Frank Konvalin and wife to Emil Konvalin. Frank Konvalin died before the trial of suit and the action proceeded against the other three defendants. Trial resulted in a decree setting aside the deed as prayed, and Emil Konvalin and Agnes Konvalin, his wife, have appealed.

On April 18, 1924, Frank Konvalin and Anna Konvalin, his wife, conveyed 240 acres of land in Pierce county, worth approximately $30,000, subject to a mortgage of $7,690, to his son Emil Konvalin. At said time said Frank

Konvalin was surety on a note for $8,169.57, given by his son Charles to plaintiff bank, all of which was known to the parties to said deed. On September 22, 1924, the plaintiff brought suit on said note in Stanton county, and thereafter recovered a judgment and caused a transcript of same to be filed in Pierce county, and, after issuance of execution and its return unsatisfied, filed this creditor's bill to have said deed set aside on the ground of fraud. Defendants Emil Konvalin and Agnes Konvalin in their answer claim that the property was conveyed to Emil in good faith and for a valid and adequate consideration of a past-due debt in the sum of upward of $23,000, and an agreement for future support of the grantors.

Frank Konvalin, grantor, was made a party defendant to the suit, but died before issue made up. In the trial a controversy arose as to who was the personal representative of said Frank Konvalin, deceased. The lower court permitted Emil to testify as to conversations with his deceased father, but in answer to a special written interrogatory at the close of the case held that he was incompetent to testify, and, if competent, the court was not satisfied that his testimony as to such conversations and transactions was true. Section 8836, Comp. St. 1922, has been construed many times by this court to mean that a personal representative is one that has succeeded to the rights of the deceased, either by purchase, descent, or operation of law. Here the defendant grantee claimed to succeed to the rights of the grantor by purchase. He was sued jointly with his grantor. Whatever rights Frank Konvalin had for transferring his property to his son Emil, or for withholding it from the plaintiff, his said son now has. He is, therefore, the representative of his father in this case and his testimony as to transactions and conversations with his deceased father was competent. *Holladay v. Rich*, 93 Neb. 491. The case of *Adler & Sons Clothing Co. v. Hellman*, 55 Neb. 266, relied upon by appellee, is easily distinguished from the case at bar. In that case the grantee was also executrix of the deceased's estate.

Under section 1329, Comp. St. 1922, it is the duty of the executrix to bring an action. She refused and the creditor brought it in her stead. It was held that the creditor occupied the position of the executrix in the suit and as to them the claim of defendant was adverse and she was not permitted to testify by reason of her refusal to carry out her duty as executrix. No such situation confronts us in this case.

This brings us to the important and controlling question in the case: Was the transfer made in good faith and for a valuable consideration? The facts surrounding the conveyance of land between relatives will be closely scrutinized where fraud is charged, to discover if the conveyance was made for the purpose of hindering, delaying or defrauding creditors. This rule was recognized by the defendants in the lower court and they assumed the burden of proof. Emil contends that, at the time of the transfer herein and as part of the consideration therefor, his father owed him $7,200 commission for negotiating the exchange of Boone county land for Dodge county land in 1915, and for commissions for negotiating the exchanging of the Dodge county land for the Pierce county land, by reason of an oral agreement with his father made at or before the time of each of said exchanges. His uncorroborated evidence on these matters, the staleness of the claim, the family relationship, and the peculiar circumstances surrounding the same are insufficient to carry the burden of proof which he assumed. He further contends that his father was owing him an additional sum of $14,295, by reason of money loaned to his father, taxes paid and improvements erected on the Pierce county land during the period from 1918 to 1923, on the express agreement of his father to repay the same. His testimony in this case shows that he, his wife and family, and his father and mother occupied the premises as one family, and lived upon the produce therefrom; that he had no specific agreement with his father to retain the proceeds of the land, convert them into money and loan same to his father, or

that he had any other income from which to secure money. He fails to account for the proceeds from the premises during this period or to prove any agreement absolving him from the payment of rent for same. The only agreement which he claims was that made in 1910 when he, as a boy of 18 years, took over the management of the farm to pay off the debts, and his testimony as to that arrangement is vague and unsatisfactory. After 1915 the debts seem to have all been paid, and whatever moneys he paid to or on behalf of his father were moneys derived from the income from the farm, and therefore belonged to the father, and not to defendant. Likewise, the improvements and repairs put upon the farm were made with money earned upon the farm. The claim of Emil in this regard is also inconsistent with the acts of the father. His father always claimed ownership of the farm and stock and equipment. There is evidence that on signing plaintiff's note he stated in the presence of Emil that he owed only $6,000 and intended selling farm in payment of debts and dividing the remainder among his children. In 1921 his father gave Emil the sum of $6,000 and raised the amount by a mortgage upon the farm. In his financial statement furnished the mortgage company he stated that he owed only the sum of $6,000, and owned all of the stock and machinery on the place. This was a circumstance to show the grantor's fraudulent intent in this action. *Leach v. Edgerton,* 203 Ia. 512.

The agreement to furnish support for the grantor and his wife seems not to have been carried out. The mother now lives with a daughter, and the only support furnished was the sum of $25. The grantee seems also to have acquired the proceeds of a certain insurance policy upon the life of his deceased father, which was previously held in the name of his mother as beneficiary.

From a reading of the testimony we are convinced that the defendants have failed to sustain the burden of proof by showing that this transfer was made in good faith and for a valuable consideration. The evidence indicates that

it was made with knowledge of plaintiff's debt and for the purpose of hindering and defrauding the plaintiff in the collection of its judgment. The decree of the trial court is therefore AFFIRMED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, ET AL., APPELLANTS, V. VALENTINE STATE BANK: MRS. WALTER FLOWERS, INTERVENER, APPELLEE.

FILED JUNE 26, 1928. No. 26021.

Banks and Banking: ACTION FOR DEPOSIT: INSUFFICIENCY OF EVIDENCE. In an action by a married woman to recover a claimed amount as a deposit in a bank, evidence showing that the deposit was made in 1916 and no demand was ever made by her for any part of the amount nor for any interest thereon for more than nine years, and that the bank had credited the deposit to credit of the husband's account and by him it was subsequently withdrawn by checks, together with evidence that regular monthly statements had been returned to both husband and wife showing the condition of their respective accounts, without any objection from the wife, *held* not sufficient to support a finding and decree in favor of the wife.

APPEAL from the district court for Cherry county: EARL L. MEYER, JUDGE. *Reversed and dismissed.*

O. S. Spillman, Attorney General, C. M. Skiles and *J. C. Quigley,* for appellants.

W. C. Heelan, contra.

Heard before GOSS, C. J., THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BROADY, District Judge.

Mrs. Walter Flowers, the appellee, filed her claim for $1,065.50 with the receiver, as the claim of a depositor against the insolvent Valentine State Bank. The receiver disallowed the claim, and Mrs. Flowers appealed to the district court, and that court found in her favor, entered judgment accordingly against the bank and allowed the claim as a judgment against the state guaranty fund com-

mission. The receiver and the guaranty fund commission appeal to this court.

On February 20, 1916, Mrs. Flowers deposited in her name, as Alice Flowers, the sum of $65.39 in the Valentine State Bank. On May 8, 1916, there was deposited in the same bank the sum of $1,065.50. This last deposit was in the name of Mrs. Walter Flowers and was made by F. M. Walcott, her attorney. Mrs. Flowers claims that when she made the deposits she intended to retain and keep the same as her own personal property, and that she never authorized or empowered any one to withdraw any of the deposits. No checks were drawn by her, nor was any demand ever made by her until 1925.

By his answer the receiver of the bank says, so far as the deposit of $65.39 is concerned, Mrs. Flowers has drawn out the entire amount by her check and there has been a complete withdrawal thereof; and as to the second deposit, of $1,065.50, says that it was made by F. M. Walcott, who was attorney for Mrs. Flowers, in the name of Mrs. Walter Flowers, and says that on the same day, after the deposit slip had been issued, Mrs. Flowers instructed an officer of the bank to credit the account to the credit of her husband, W. G. Flowers; that pursuant to that request and acting under such instructions the bank transferred the deposit to the account of her husband, that the account thereafter ran as common property of both the husband and this claimant, and claims that the money represented by this deposit had subsequently been withdrawn on the husband's general checking account.

This inquiry concerns only the deposit of $1,065.50, as it is clear, from the evidence, that the first deposit by Mrs. Flowers has been closed by subsequent withdrawals. The sole question to be determined is whether or not Mrs. Flowers authorized or directed that the deposit of $1,065.50 should be transferred or credited to the account of her husband.

It is undisputed that the original deposit was made in the name of Mrs. Walter Flowers and was made by F. M.

Walcott, her attorney, who was living at that time. She says that she received this money from her father's estate, and that the same was received after banking hours and that Mr. Walcott made the deposit for her and in her name, as shown by the original deposit slip. This was on May 8, 1916. The deposit was made as a general deposit without interest. Mrs. Flowers claims that she has never withdrawn any of the account, nor ever authorized or empowered any one to transfer the same to any other person. She admits that she has never made any demand for the money, or any part of it, until about 1925 and after the bank became insolvent. She produced the original deposit slip in support of her contention. The duplicate deposit slip which was retained by the bank shows a pencil notation written in the handwriting of one of the bank officers or employees, as follows: "Deposit to the account of W. G. Flowers." The bottom part of this deposit slip is mutilated and torn off, together with a part of the pencil notation. The record does not show that this notation was made by Mrs. Flowers or at her direction, and no written authorization of Mrs. Flowers was produced, nor was any witness able to testify directly that she ever authorized such transfer. No officer of the bank could recall any of the particulars to the transaction other than as above stated, together with the bank ledger sheets, which were introduced in evidence, showing the separate accounts of both Mrs. Flowers and her husband, W. G. Flowers. Mrs. Flowers admits she made no demand for payment of this money or any part of it until early in 1925, nine years, at least, after the original deposit was made. The bank pleads that, on the first of each month following the original deposit, they sent a statement of the account to each depositor together with canceled checks, and that they sent the same to Mrs. Flowers and also to her husband, and that neither Mrs. Flowers nor her husband ever made any complaint as to the condition of their account as shown by these statements. As defense the bank pleads an account stated, estoppel, and the statute of limitations.

As there is little direct evidence in this case, it is necessary to give a complete picture of the whole situation, which, in substance, is as follows: Mr. and Mrs. Flowers were ranchers and farmers residing in Cherry county, and, according to her testimony, at least a part of the operations were carried on in her name. She says that much of the time she operated the ranch herself while her husband was doing other work. She says she never drew any checks on the bank on either her own or her husband's account, and the bank officials say they have no specific knowledge or recollection of this item, but that the husband did a considerable checking account at the bank, and also borrowed considerable money from the bank. The ledger sheets of the bank show only two or three entries in the separate account of Mrs. Flowers, which were in February and March of 1916, and the account balanced and closed on April 19, 1916. During the years following 1916 it is admitted by Mrs. Flowers that she and her husband were borrowers of considerable money at the bank, and as security for payment of which they gave chattel mortgages on their personal property. Like a great many other farmers and ranchers following the years 1919 and 1920, they became heavily involved financially, and in 1924 or 1925, after they had lost the ranch by foreclosure, they held an auction sale of all their personal property, and while this sale was being held the bank garnisheed the clerk of the sale and out of that proceeding obtained payment of some $300 or $400 owing to the bank by the Flowers. It was following this garnishment proceeding that Mrs. Flowers made the first demand on the bank for the account at stake in this action.

While Mrs. Flowers denies that she ever authorized the transfer of this account to the credit of her husband and none of the officers, now with the bank, testifies to this particular transaction, the ledger sheets of the bank show that on May 6, 1916, deposit was made to the credit of her husband, W. G. Flowers, in the sum of $1,065.50, and that

thereafter Mr. Flowers made deposits and checking and withdrawals. On March 8, 1917, he had overdrawn some few cents. Deposit sheets for subsequent years are not shown, but it is clear, from the record, that these people continued to be customers of the bank until 1925.

It does not seem possible that any person in comparatively meager circumstances would let over $1,000 remain in an open checking account with the bank for nearly ten years without giving it any attention or at least placing it so it would draw interest. It is almost as startling as to read of a big business man completely forgetting a deposit of $5,000,000. It may happen. But it is so incredible as to at least cast a heavy shadow of doubt. It does not seem possible that this woman, who was more or less active in assisting her husband in the operation of considerable of a ranch business and knew that he was borrowing money more or less extensively at the bank and who at least had knowledge, if not actually joining in the execution, of chattel mortgages to secure loans of money from this particular bank, would leave a deposit of over $1,000 lying idle without interest in the same bank for nine or ten years. The evidence offered by the bank was to the effect that on the first of each month they sent a statement to each depositor showing deposits, withdrawals, and balances, together with canceled checks, and that such statements were sent to both Mrs. Flowers and to her husband, and that the statement would show Mrs. Flowers' account was closed, and the husband's account would show the transfer of this particular deposit to his account, and that no objection had ever been made to these statements. Mrs. Flowers admits that she had access to these statements and could have inspected them had she desired, but says that it was her husband's account, and that she did not pay any attention to it; and that she did not know the bank had transferred the money to her husband's account. It may be so, but it does not seem within the bounds of reason that, in such a situation as these people who were having a hard struggle during these years, an item of this

size would be completely forgotten and lost for a period of approximately nine years. Mrs. Flowers admits that the bank sent monthly statements of the accounts of both herself and husband, and no objection was made for more than nine years.

The evidence in this case is not sufficient to support the finding and decree of the district court. The decree is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

HOWELL, J., dissents on the facts.

JOHN I. TAMINOSIAN, APPELLANT, V. ELLEN G. TAMINOSIAN, APPELLEE.

FILED JUNE 26, 1928. No. 26093.

Divorce: DECREE MODIFIED. Evidence examined, and *held* to support a decree of divorce in favor of the wife, on her cross-petition, but modified to permit minor child, custody of whom is given to mother, to visit with the father one day in each week.

APPEAL from the district court for Douglas county: EDMUND B. CARRIGAN, JUDGE. *Affirmed as modified.*

C. E. Walsh, for appellant.

Shotwell, Ready & Shotwell and *Paul S. Sutton, contra.*

Heard before GOSS, C. J., THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BROADY, District Judge.

This is an action for divorce brought by the husband who is appellant in this court. The wife, the appellee, by answer and cross-petition asked for affirmative relief on the grounds of cruelty and nonsupport. The trial court awarded a divorce to the wife and, in lieu of alimony, decreed the full title of the home property to the wife, and permanently enjoined the plaintiff, the husband, from coming upon the premises for any purpose or from appearing

near the premises in a threatening and menacing manner. The parties occupied the premises as a home and also a cleaning establishment and rug repairing business, which they operated at their home, and this business, other than the rug branch, was given to the wife exclusively. The husband appeals and complains bitterly against the award of the premises to the wife and the injunction preventing him from going upon the property. He also complains against that part of the decree that awards the custody of all the children to the wife and restraining him from the use of the trade-name in the cleaning business.

These parties are naturalized Armenians and were married in 1906. They have three children, two daughters, about 21 and 19 respectively, and a son 13 years of age. The two eldest are self-supporting and the son is a school boy and part time, at least, sells newspapers. At the time of the marriage the husband either owned or bought the lot on which the home now stands and since then has made the house his present home and has made some additions thereto. During all of this time they have conducted a clothes cleaning business, and the plaintiff is an expert oriental rug-repair man and has conducted a more or less extensive business in that line in one part of the premises. The evidence shows that the principal income from the business for the family has been the cleaning and pressing business, and that the wife has done most of the hard work in that department. While the husband disputes that statement and claims that he has done most of the work, the testimony of the children and others amply supports the contention of the wife that she herself did most of the actual work in the cleaning and pressing department. The husband says in one place that he was "general manager" and "I did all the soliciting and then when I went to fish I did the soliciting and brought work to the house."

It would serve no useful purpose to attempt to review the evidence in this opinion. It is sufficient to say that for a number of years these people have been quarreling more or less bitterly. While the wife's showing of physi-

cal cruelty is not very convincing, there is evidence that at one time he took hold of her by the throat; and the son tells us that on that occasion, or soon after, he found his mother lying on the floor crying. One of the daughters testifies that the father used abusive language to the mother, stated that she did not want to repeat it to the court, and said that when the father would start in on these outbursts she would leave rather than remain and hear it. The children all testify in the highest terms of their mother, to the effect generally that she was hard-working and industrious; that she kept a good home for them. They also testify that the mother was the main support of the family, and that she did practically all of the work in the clothes pressing and cleaning business. The evidence amply supports the decree in awarding a divorce to the wife.

As to the award of the property and business to the wife, the evidence shows clearly that the wife is the main worker in at least the clothes cleaning and pressing business. The husband did little, if anything, more than possibly soliciting business and making collections and matters of that kind. The income of the business is meager and not at all lucrative. One daughter, at least, is self-supporting, and remains at home and has paid for some time the building and loan dues on the home property. The property is worth from $5,000 to $6,000, and at the present time is incumbered for $3,000, and, from reading the record on this question, we think the district court correctly found that the equity in the property does not exceed $2,000. The cleaning and pressing business was carried on under the trade-name of "Dundee Cleaning Company," and is the principal source of income of the family, and the continued operation of the business is the only source of income which the wife has in support of herself and minor child. The award of the premises and the business to the defendant was proper. It would be doing less than nothing, in view of the conditions existing in this family, to permit the husband to go upon the premises, and the injunction to prevent the husband from going upon the premises and

interfering with the wife in any way in the peaceable occupation of the premises is proper.

While the decree of the district court is somewhat indefinite as to the right of the father to visit the children or have the children with him, the father bitterly complains on his part and expresses an affectionate desire to visit with and retain the affection of the children. We do not feel that either parent should be deprived of the love and affection of his own children so long as the same can be agreeably retained. The daughters are practically of age now and ought to be able to determine that question for themselves, and we think, so far as the decree attempts to prohibit the father from visiting the children, it should be modified to the extent of permitting the daughters to visit with the father, if they so desire. But under the circumstances in this case the visitations should be at a place other than at the home of the mother, unless it should be with the mother's consent. The father should also have the right to have the son with him one day in each week, if the boy wants to go with him, provided the father does not molest or interfere with the mother or her peaceable occupancy of the home premises.

The decree of the district court is modified to the extent that the children be permitted to visit the father as above indicated, and affirmed in all other respects.

AFFIRMED AS MODIFIED.

ISAAC R. L. WILES, APPELLANT, V. FARMERS IRRIGATION DISTRICT, APPELLEE.

FILED JUNE 26, 1928. No. 25701.

1. Waters: IRRIGATION DISTRICTS: LIABILITY. In the absence of negligence, an irrigation company incurs no liability by improving an existing drainage course.
2. ———: ———:———. Excessive seepage is a common enemy in an irrigation country. In relieving agricultural lands from seepage, an irrigation district is only liable for negligent constructon or operation of its seep ditches after it obtains the right of way therefor.

3. **Evidence** examined, and *held* to support verdict for defendant.

APPEAL from the district court for Scotts Bluff county: P. J. BARRON, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Raymond & Fitzgerald, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and CHASE, REDICK and WHEELER, District Judges.

WHEELER, District Judge.

This is an appeal by the plaintiff from a judgment entered upon a jury verdict for the defendant in an action against an irrigation district for damages for flooding plaintiff's land.

Plaintiff's quarter section lies about two miles north of the North Platte river in Scotts Bluff county, Nebraska. On the north side of the river the country is flat and level for about two miles, then the ground arises somewhat abruptly from 80 to 100 feet to what is known as the table land. The table land is comparatively level and gradually rises in a northerly direction 10 or 15 miles to the hills. This configuration extends for many miles up and down the river. At intervals long draws traverse the table land almost at right angles to the river. Plaintiff's land lies at the base of the table almost at the outlet of one of these long draws, locally known as "Nine Mile canyon," into which an area of from 40,000 to 50,000 acres of land drains. The whole area is irrigated from canals running along the north edge of the table.

With the extension of irrigation came seepage. When water was placed on the land for agricultural purposes it raised the general water table, and in places lower than the canal seeped to the surface. This condition necessitated drainage. The defendant company, to counteract the effect of its irrigating system and to save the land under it for agricultural purposes, deepened the Nine Mile canyon and

with plaintiff's permission constructed a ditch running north and south along the natural line of drainage to carry the seepage to the North Platte river. In September, 1923, a heavy rain storm flooded Nine Mile canyon and the floodwaters coming down the ditch deposited silt and debris on plaintiff's land. There is some testimony to the effect that before the flood plaintiff's land was worth from $50 to $75 an acre and after the flood about $15, and other testimony to the effect that it was only worth $10 or $15 an acre before the flood and about the same afterward. The only crop on plaintiff's land was salt hay and sweet clover. Plaintiff asked for $10,000 damages.

According to the pleadings the action was based upon the negligent construction and operation of defendant's ditch, in that it contained no riprapping or drops; that defendant did not keep it open and dredged out, and that it was so constructed that there was an abrupt change of grade on the north of plaintiff's land, which caused a deposit of silt and gravel. The damage was done by floodwaters, and not by seepage. The trial judge took from the jury the question of negligence in the construction and operation of the ditch, and instructed the jury to find for the plaintiff, if the defendant's ditch did not follow the natural course of drainage and diverted the canyon water over plaintiff's land. The jury found for the defendant under this instruction. The instruction was more favorable to the plaintiff than he was entitled to. In this case a recovery for plaintiff could only be predicated upon defendant's negligence in the construction or operation of the drainage ditch.

Upon appeal plaintiff advances the proposition that where an irrigation district constructs a ditch to care for seepage water, it becomes liable for any damages resulting thereby. We are not in accord with this proposition. Seepage is a natural result of irrigation—a necessary concomitant detriment of an agricultural benefit. It is a common enemy which it is both the right and duty of the irrigation district to relieve landowners from. In fighting seepage an

irrigation district only becomes liable for negligence in the construction, care, or operation of its seepage ditches.

The only issues in this case are those of fact—whether defendant's ditch followed the natural course of drainage; whether defendant's operation constituted an improvement of a natural watercourse; and whether there was any negligence on the part of the defendant in the construction and operation of its drainage ditch. The jury found for the defendant on all of these issues. While the record shows some conflict in the evidence as to whether defendant's ditch followed the established watercourse, the preponderance of the evidence establishes the fact that it did. The damage was done by storm-water, not by the seepage flow. Defendant diverted no storm-water into the Nine Mile canyon drainage area and brought no flood-water upon plaintiff's land which would not have flowed there in the absence of the seepage ditch. There is no testimony as to negligence or as to any manner in which defendant's ditch could or should have been improved, either in construction or operation. The instructions were more favorable to the plaintiff than the law warrants, and the judgment for the defendant must be, and is, AFFIRMED.

AUGUST BRANDEEN, APPELLANT, V. RALPH M. BEALE ET AL., APPELLEES.

FILED JUNE 27, 1928. No. 26382.

1. **Pleading:** DEMURRER. A motion to strike a petition from the files because the facts pleaded are insufficient, having been sustained by the court, is in effect a general demurrer; it admits the truth of all well-pleaded facts.
2. **Limitation of Actions:** SUIT TO VACATE JUDGMENT FOR FRAUD. In a proceeding brought under section 9160, Comp. St. 1922, to modify or vacate a judgment on account of fraud, after the two years from the rendition of the judgment, if the petition shows that the facts were discovered within the period of limitation and fails to show any good reason why the two years should be extended, it is not error for the court, on motion or demurrer, to strike the petition from the files.

3. **Statutory Provisions.** Section 9160, Comp. St. 1922, in subdivision three, gives power to the district court after the term to vacate or modify its judgments for irregularity in obtaining judgment. Under section 9167, the statute of limitations is fixed at three years, and under section 9168 the provisions of the sections are applicable to the supreme and county courts.
4. **Judgment: VACATION: IRREGULARITIES.** Section 9160, Comp. St. 1922, may not be invoked by a litigant in a separate suit in equity to vacate or modify a judgment for irregularity in obtaining it, after such judgment, in a suit between the same parties, on the same issues, has been pronounced by this court as regularly obtained.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

C. C. Flansburg and *John S. Bishop,* for appellant.

Claude S. Wilson, Roy F. Gilkeson, Hymen Rosenberg and *Sterling F. Mutz, contra.*

Heard before GOSS, C. J. ROSE, DEAN, GOOD and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

GOSS, C. J.

Plaintiff appeals from an order, made December 1, 1927, dismissing his action against the defendants, upon the plaintiff refusing to plead further and electing to stand upon his petition after the court had made orders, on October 6, 1927, sustaining separate motions of defendants to strike the plaintiff's petition from the files.

This is the fourth appearance of this litigation in this court in one form or another. The prior occasions were (1) in *Brandeen v. Beale,* 110 Neb. 686, decided July 13, 1923, lost by plaintiff in the district court, wherein Brandeen appealed and secured a reversal on the ground that the guardianship proceedings attacked by him were void; (2) in *Brandeen v. Lau,* 113 Neb. 34, decided December 31, 1924, won by plaintiff in the district court, wherein defendants appealed and secured a reversal on the ground that a *nunc pro tunc* order made in the guardianship pro-

ceedings, after the mandate in the first case went down, should have been recognized by the district court in error proceedings from the county court; and (3) in *Brandeen v. Beale,* No. 25436, a commissioner's opinion, decided October 13, 1926, not reported, but which is the law of that case under the statute relating to opinions written by the commission and approved by the court. Laws 1927, ch. 69. In that case, Brandeen had appealed from an order of the district court dismissing his action against John D. Lau and H. P. Lau Company, on motion of the defendants for judgment on the pleadings, without prejudice to his proceeding in the county court. The petition in that suit was for damages against the defendants for a conspiracy to destroy his business. The defendants had answered setting up as defenses the guardianship proceedings, including the *nunc pro tunc* proceedings of January 14, 1924. The plaintiff replied, challenging the guardianship of Beale and the *nunc pro tunc* decree in those proceedings in almost the identical manner he has attacked them here. The opinion affirmed the judgment of the district court sustaining the motion of defendants for judgment on the pleadings. In that opinion the court said: "The appellant, if he felt that a fraud had been practiced upon him in the procurement of a judgment appointing a guardian over him, had a clear and statutory remedy. Section 9160, Comp. St. 1922, provides that a district court shall have power to vacate or modify its own judgments and orders after term, among other things—'For fraud practiced by the successful party in obtaining the judgment.' Section 9168 provides that the provisions contained in section 9160 apply also to the supreme and county courts."

It seems that Brandeen then brought this action in the county court, following the suggestion above quoted from the opinion in the last case. He apparently, however, relies not only on that fourth subdivision thus quoted but also on that portion of the third subdivision of section 9160 giving power to the county and district courts to vacate or modify its judgments after term for "irregular-

ity in obtaining a judgment or order." The transcript alone does not contain all of the related and helpful facts required to make this rather confusing case clearer. In the briefs of both parties, however, we discover statements to the effect that the proceedings were begun in the county court after the mandate in the last case before our court (No. 25436, heretofore quoted) had been made effective in the district and county courts by proper entries, Brandeen evidently filed in the county court, on January 5, 1927, an application or petition that the *nunc pro tunc* order obtained by Beale, appointing him guardian of Brandeen, be set aside because induced by fraud of the defendants and because irregularly made. Ultimately, on August 5, 1927, the county court sustained the motion of defendants to strike the petition for the reason it showed on its face that plaintiff was not entitled to bring or maintain the action. Brandeen's transcript on appeal from the county court was filed August 15, 1927, in the district court.

The transcript of the district court proceedings shows that the petition was filed August 25, 1927; that on October 6, 1927, the court sustained the separate motions of the defendants Lau and Beale to strike the petition from the files on the ground it shows on its face that plaintiff is not entitled to bring or maintain the action; and that, on December 1, 1927, the plaintiff refusing to plead further and electing to stand on his petition, the case was dismissed.

At most, there are only two questions at issue in the case: Whether the court erred in striking the petition from the files; and whether the court erred in dismissing the case. In reality they are one. In effect the parties assent to this in their arguments. They agree, also, that a motion to strike a petition from the files because the facts pleaded are insufficient, having been sustained by the court, is in effect a general demurrer, it admits the truth of all well-pleaded facts.

Many things are discussed in the briefs. It seems to us our only task is to discover what facts are well pleaded

in the petition and to decide whether they sustain plaintiff's cause of action against the defendants.

The plaintiff alleged that, on June 6, 1921, the defendants filed in the county court a petition for the appointment of a guardian for the plaintiff, a copy of which is attached and made a part of the petition. An examination of this copy shows that the petitioner was described merely as "a creditor of the said August Brandeen." The petition further alleges the issuance of notice of hearing on the same day as the filing of the petition, served on the following day on plaintiff; that the filing of the petition and the subsequent proceedings in the county court "were a part of a fraud or conspiracy on the part of the defendants to unlawfully obtain possession of the property of the plaintiff and to deprive him of his property and liberty and condemn him to a civil death;" that thereafter, between June 7, and June 22, 1921, "in furtherance of said conspiracy and in order to induce plaintiff not to appear in said guardianship proceedings, the defendants, orally, falsely and fraudulently represented to the plaintiff that said petition for the appointment of a guardian was filed through inadvertence, error, or mistake and would be withdrawn and said proceedings dismissed; that the plaintiff should not worry or trouble himself about said petition or proceedings, did not need to go to any expense in the matter, and did not need to attend the hearing on June 22, 1921, or be represented thereat, because the defendants would dismiss said proceedings;" believing the representations true and relying thereon, plaintiff did not appear to oppose the appointment, he believed the guardianship proceedings had been dismissed, and would have appeared in opposition had he not relied upon said promises; that he had and has a complete defense to the application for guardianship, that he was at all times mentally and physically strong, able to manage his business, and was in fact operating his business and managing his property, as defendants well knew, and that said appointment was procured by false swearing and by the fraud and conspiracy of the defendants as

alleged; that on June 22, 1921, the defendants, in violation of their representations and promises to have the guardianship proceedings dismissed, secretly and wrongfully appeared in the county court, concealed from and failed to disclose to said court the facts of their inducement to plaintiff not to appear, and that plaintiff was competent and personally conducting his business, but they falsely and fraudulently represented that the plaintiff was incompetent, and that he consented to or desired the appointment of a guardian; that by reason of said fraud and deceit the county court was misled, deceived and tricked into entering a judgment or decree appointing the said Beale as guardian of the person and estate of plaintiff, a copy of said decree being attached to and made a part of the petition; that the petition did not state facts sufficient to confer jurisdiction upon the court and the decree was invalid and the proceedings wholly void, as later declared, on July 13, 1923, by the supreme court, in the case of *Brandeen v. Beale*, 110 Neb. 686; that on January 7, 1924, the defendants served on plaintiff notice of a motion to "correct the record *nunc pro tunc*," to be heard in the county court on January 10, 1924, and "that the plaintiff appeared specially in said court and challenged the jurisdiction of the court and its power to hear said motion because of lack of jurisdiction of both the person and the subject-matter; that such special appearance was argued and submitted to the court and taken under advisement; that there never was any hearing on said motion in said county court; that no showing in support of said motion was filed; that no witness was sworn or examined; that no evidence was offered or received; and the plaintiff did not have his day in court and was denied opportunity to oppose the appointment of a guardian of his person and property and was stigmatized as incompetent and condemned to 'civil death.' * * * That there was irregularity in entering said *nunc pro tunc* order or decree in that it was entered contrary to the course of law and the practice of said county court; without any ruling upon the special appearance of the plaintiff; with-

out any hearing on said motion to 'correct the record *nunc pro tunc;*' without giving the plaintiff his day in court or opportunity to oppose said motion; without any showing being filed, or offered, or received in support of said motion; without any witness being sworn or examined; without any evidence being offered or received; and that it was based upon the personal recollection of the judge alone, or on 'facts locked in the breast of the judge,' and not on any paper or file in the case, or the minutes of the judge, or an entry of the clerk made at the time; that it was a transparent expedient or device to validate a void proceeding and escape from the decision of the supreme court holding said proceedings void and said county court without any jurisdiction of the cause of action or the person of this plaintiff; that the court was without jurisdiction of the person of this plaintiff; that the court was without jurisdiction of the subject-matter of said proceedings; that it was a mutilation of the record and not a correction; that this plaintiff was competent and not subject to guardianship; that no notice of the time and place of hearing 'no less than fourteen days before the time so appointed,' as required by section 1589 of the Compiled Statutes of Nebraska for 1922, was given; that there was no 'full hearing and examination,' as required by section 1590 of the Compiled Statutes of Nebraska for 1922; that there was no examination of the plaintiff, or of any member of his family, or of any physician who knew or had examined or observed the plaintiff or of any disinterested witness claiming to have knowledge of the mental condition or competency of the plaintiff."

"Wherefore, the plaintiff prays that said *nunc pro tunc* order or decree pretending to appoint the said Ralph M. Beale guardian of the person and estate of the plaintiff be set aside and vacated and found and declared to be invalid and of no force and effect, and for such other, further and different relief as may be equitable and just."

Attached to the petition and made by reference a part thereof are four exhibits, among which is the order com-

plained of, dated June 22, 1921, which was the date of the original order appointing Beale guardian in the county court. The order was actually entered on January 14, 1924, and under its authority Lau's relation to Brandeen was extended in the original petition for guardianship by the words "and friend" added to the former description of "creditor."

On January 5, 1927, as the commencement of this present case, appellant filed his petition in the county court to set aside the order on the two grounds of fraud and irregularity. The appellees say that the statute of limitations has run against the action for fraud, and that the action for irregularity has been concluded by the facts and by the prior litigation.

As to the statute of limitations on the cause of action for fraud: The fourth subdivision of section 9160, Comp. St. 1922, grants power to the district court to modify or vacate its judgments after the term for fraud practiced by the successful party; section 9161 provides for the proceedings by petition; section 9167 provides that proceedings to vacate or modify a judgment or order for the cause mentioned in the aforesaid fourth subdivision must be commenced within two years after the judgment was rendered or order made; and section 9168 makes the provisions of these sections applicable to the supreme and county courts. The sections here referred to, relating to the action based on fraud, were considered in *Krause v. Long*, 109 Neb. 846, and the rule was stated, as supported by cases, as follows:

"The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop*, 70 Neb. 747; *State v. Lincoln Medical College*, 86 Neb. 269; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44; *Proctor v. Pettitt*, 25 Neb. 96; 23 Cyc. 981; *Wirth*

v. Weigand, 85 Neb. 115; *National Surety Co. v. State Bank,* 56 C. C. A. 657; *Thompson v. Laughlin,* 91 Cal. 313."

It seems perfectly apparent that Brandeen knew for a long time before the entry *nunc pro tunc,* on January 14, 1924, substantially all, if not all, the facts as to the fraud charged by him as the procuring cause of the guardianship over him. At any rate, all the fraud he now charges was known to him on that date and he cannot be permitted to take advantage of the two-year statute of limitations on the ground of fraud by his petition filed nearly three years after the order last complained of was made. We may state the rule as applied to this phase of the case in these words: In a proceeding brought under section 9160, Comp. St. 1922, to modify or vacate a judgment on account of fraud, after the two years from the rendition of the judgment, if the petition shows that the facts were discovered within the period of limitation and fails to show any good reason why the two years should be extended, it is not error for the court, on motion or demurrer, to strike the petition from the files.

We proceed to consider the cause of action for irregularity in entering the order or judgment. The same section of the statute, 9160, but in subdivision 3, gives power to the district court after the term to vacate or modify its own judgments for irregularity in obtaining the judgment. Under section 9167 the statute of limitations in this phase is fixed at three years. Section 9168 makes these provisions applicable to the supreme and county courts. The suit was commenced on January 5, 1927, to vacate the order entered January 14, 1924. Thus it was within the period fixed by statute. The appellees contend that the entry of this *nunc pro tunc* order was not an irregularity within the contemplation of the statute and that it has already been passed upon in the litigation between the parties.

By reference to the record in *Brandeen v. Beale,* No. 25436, we find that, in Brandeen's reply filed in the district court on January 20, 1926, it was pleaded, with reference

to the justification afforded by the *nunc pro tunc* order, set up in the answers of the defendants, that the plaintiff appeared in the county court January 10, 1924, and objected to the consideration of the motion for the judgment for the reason, among others, that the court lacked jurisdiction of both the person and the subject-matter; and he pleaded that the county court had no jurisdiction or authority to make or enter such order, alleging, as he does in the present case, that there was no hearing on the merits, no witnesses examined, no ruling on his objections to jurisdiction; previously in the case of *Brandeen v. Lau,* 113 Neb. 34, the same questions had been litigated between the parties, the district court had held with Brandeen, and this court had reversed the district court and held that the county court had jurisdiction to render the *nunc pro tunc* judgment complained of. We think that the facts deduced from these former hearings show that, ever since the fall of 1921, Brandeen has been aware of the alleged fraud perpetrated upon him by the appointment of a guardian, and that he has sought in the two cases cited to attack the regularity of the order then and now complained of. Counsel for appellant has cited many instances in which judgments have been set aside for irregularities and has sought to apply them here. Their appeal would have been cogent at an earlier stage of the litigation over this particular branch of the case, but we are of the opinion that this court, particularly in the case of *Brandeen v. Lau,* 113 Neb. 34, definitely foreclosed appellant from further attack on the regularity of that judgment. It is the law controlling this case. Section 9160, Comp. St. 1922, may not be invoked by a litigant in a separate suit in equity to vacate or modify a judgment for irregularity in obtaining it, after such judgment, in a suit between the same parties, on the same issues, has been pronounced by this court as regularly obtained.

We are of the opinion that the judgment of the district court was right, and it is AFFIRMED.

STATE, EX REL. CITY OF LINCOLN, RELATOR, V. L. B. JOHNSON, AUDITOR OF PUBLIC ACCOUNTS, RESPONDENT.

FILED JUNE 27, 1928. No. 26607.

1. **Municipal Corporations**: ISSUANCE OF BONDS: GENERAL ELECTION. A state-wide primary is a "general election" within the meaning of that term as used in the Lincoln Home Rule Charter in the grant of power to issue municipal bonds upon a majority vote.
2. ———: CHARTER PROVISIONS. In matters relating exclusively to municipal affairs, the Lincoln Home Rule Charter prevails over conflicting provisions in a state statute containing legislation on the same subject applicable to cities of different classes generally.
3. ———: ISSUANCE OF BONDS. Under the Lincoln Home Rule Charter, a majority vote is sufficient to carry a proposition to issue municipal bonds for the purpose of establishing and equipping an aviation field for aerial traffic.
4. ———: GOVERNMENTAL PURPOSES: AVIATION FIELD. An equipped municipal aviation field is both a "public service property" and a "public utility" within the meaning of the Lincoln Home Rule Charter and the establishment of such a field is a governmental purpose for which bonds may be voted and taxes levied and collected.

Original proceeding in mandamus to compel respondent to register certain bonds issued by relator. *Writ allowed.*

C. Petrus Peterson and *Charles R. Wilke*, for relator.

O. S. Spillman, Attorney General, for respondent.

Heard before GOSS, C. J., ROSE, DEAN and THOMPSON, JJ., and CHASE, REDICK and WHEELER, District Judges.

ROSE, J.

This is an original application for mandamus to compel the auditor of public accounts to register and certify municipal bonds in the sum of $100,000 issued by the city of Lincoln for the purpose of establishing and equipping an aviation field for aerial traffic. The proposition to authorize the bonds was submitted to the voters of the city at a

state-wide primary April 10, 1928—a general election within the meaning of the "Home Rule Charter." *State v. Marsh*, 107 Neb. 607. There were 6,330 votes for and 6,173 against the bonds. One ground on which the auditor declined to register them was that the bond proposition submitted to the electors did not receive 60 per cent. of the total vote as required by the statute relating to the issuance of such bonds in cities of different classes. Comp. St. 1922, sec. 4607. The city contends that the statute cited does not control the city of Lincoln, which is governed by a Home Rule Charter containing provisions for the voting and issuing of municipal bonds for "public service property" and for "public utilities" upon a majority vote of the electors. Lincoln Home Rule Charter, art. 2, sec. 1; art. 8, sec. 11. If the local Home Rule Charter of Lincoln controls, instead of the statute relating to cities of different classes, the bonds in controversy were authorized by the majority vote at the general election April 10, 1928. Discussing the power of the city of Lincoln under its Home Rule Charter this court said:

"A city may enact and put into such charter any provisions for its government that it deems proper, so long as they do not run contrary to the Constitution or any general statute." *Schroeder v. Zehrung*, 108 Neb. 573.

In considering the constitutional power of a city to frame a charter for its own government, it was held in a later case:

"The purpose of the constitutional provision is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51.

The statute requiring a vote of 60 per cent. of the electors to carry a proposition to issue bonds for the purpose of acquiring and equipping a municipal aviation field applies to metropolitan cities and to cities of the first and the second classes. It does not apply alike to every part of the state,

but is legislation confined to municipal affairs in cities of three classes and does not prevail over conflicting provisions in a Home Rule Charter. In authorizing such bonds upon a majority vote, the Home Rule Charter deals with municipal affairs alone and under the authorities cited makes the statute requiring more than a majority vote inapplicable to the city of Lincoln. In this particular the auditor's position, though taken in good faith, is untenable.

The auditor refused to approve the bonds on the further ground that an equipped aviation field is not a "public service property" or a "public utility" within the meaning of the Home Rule Charter, an "aviation field" not being specifically enumerated in the provisions authorizing the voting and the issuing of municipal bonds. This position seems also to be untenable. The city of Lincoln has power—

"To acquire, maintain and operate public service property and to redeem such property from prior incumbrance in order to protect or preserve the interest of the city therein, and to exercise such other and further powers as may be necessary or incident to the powers conferred upon such city." Lincoln Home Rule Charter, art. 2, sec. 7.

As already stated, another provision authorizes municipal bonds for "public utilities" upon a majority vote of the electors.

In a sense the Home Rule Charter is the Constitution of the city. It is a frame of municipal government and is intended to be more permanent in its nature than an ordinary statute. In general features it is in a form to meet changing conditions as they arise. An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power. In this view of the question raised by the auditor, an equipped municipal aviation field is both a "public service property" and a

"public utility" within the meaning of the Home Rule Charter which authorizes municipal bonds upon a majority vote.
WRIT ALLOWED.

FRANK E. SHARP V. STATE OF NEBRASKA.

FILED JUNE 27, 1928. No. 26320.

1. **Jury**: EXCUSE OF JUROR FOR CAUSE. Where a prospective juror shows on *voir dire* that he has conscientious scruples against returning a verdict for murder in the first degree, which may be punished by death, he may, upon being challenged by the state for cause, be properly excused.
2. ———: QUALIFICATION OF JUROR. A prospective juror who discloses on his *voir dire* that he has talked to a person who was a witness on a former trial, but which conversation he does not remember and from which conversation he formed no opinion, but formed an opinion from reading newspapers, is not thereby disqualified, provided he states, notwithstanding such opinion, he can and will disregard the same and return a fair and impartial verdict based wholly upon the evidence and instructions of the court.
3. **Homicide**: VERDICT SUSTAINED. The record, evidence and instructions of the court examined, and *held* to justify a verdict of murder in the first degree, and the imposition of the death penalty by the jury.
4. ———: MOTIVE. Motive is not an essential element of murder. The absence of evidence tending to show motive is a circumstance in favor of the accused, but proof of motive is not indispensable to conviction.
5. **Criminal Law**: INSTRUCTIONS. An instruction, telling the jury, "If you find beyond reasonable doubt that defendant purposely, intentionally, maliciously, deliberately, and with premeditation, killed his wife, * * * you will find him guilty of murder in the first degree," etc., is not error, when taken in connection with other instructions to the effect that "before you can properly find the defendant guilty, you must find that his guilt has been established by the evidence beyond a reasonable doubt."

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Max V. Beghtol and *Donald Gallagher,* for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

HOWELL, J.

Error to the district court for Lancaster county, prosecuted by Frank E. Sharp, sentenced to death for the killing of his wife.

The case is here for the second time, a prior similar sentence having been reversed in *Sharp v. State,* 115 Neb. 737, because of errors not now before us.

The information charged Sharp with "unlawfully, feloniously, purposely, and of his deliberate and premeditated malice" killing Harriet A. Sharp.

Seven errors are assigned for the reversal of the judgment, summarized as follows: (1) Overruling defendant's objection to swearing the jury, because of conscientious scruples against imposing a death penalty, on the part of many jurors excused for cause; (2) overruling defendant's challenge, for cause, of Juror Carey; (3) error in giving instruction No. 5; (4) excluding the deposition of one William Evans offered by defendant; (5) excluding the opinion of William Evans as to palm prints, offered for testing the knowledge of Carmody, a state witness, on that subject; (6) the court's refusal to dismiss the information as to first degree murder for insufficient evidence to show defendant "deliberated or premeditated the crime;" (7) the evidence does not support the verdict. These assignments will be considered seriatum.

(A) It is contended that section 10134 (3), Comp. St. 1922, which reads: "In indictments for an offense the punishment whereof is capital, that his (juror's) opinions are such as to preclude him from finding the accused guilty of an offense punishable with death," etc.—does not disqualify

a juror who answers that he possesses conscientious scruples against "the inflicting of the death penalty on a first degree murder."

Haddix v. State, 76 Neb. 369, 376, discusses the question, and there is dicta which seems to favor the contention, but it was followed by the statement: "The question, however, presented in this record is whether, under *any circumstances*, any conviction or prejudice of the juror, *however strong*, even if it would preclude the infliction of the death penalty, should be ground for challenge. * * * A juror, then, who has such opinions as to preclude him from inflicting the death penalty in any case * * * is not, therefore, qualified," etc.

Juror Termaah said, "I believe I have" conscientious scruples "against death penalty on a first degree murder charge," but no opinion that would prevent a verdict for first degree murder if he could punish in some way other than by death. This probably presents the most meager ground for challenging any juror. The juror was examined by defendant's counsel. He did not seek to develop how deep-seated were the juror's scruples, although he was afforded ample opportunity, and was in no way prevented from making full inquiry. The juror might have been able to disregard his scruples in fulfilling his sworn duty to enforce a law, even though he would not favor such a law originally. The accused was not legally prejudiced by having a juror excused who, so far as shown, might under some state of facts enforce the extreme penalty provided by law. Defendant could not legally demand a juror who would not fully enforce the law. Jurors and judges enforce laws every day against which they may have a prejudice in the sense that they may not believe them to be wise enactments. No conscientious juror or judge will allow his convictions as a unit of society to obstruct laws enacted in the manner prescribed by society as a whole.

Perhaps the other extreme arose in the case of Juror Engel. He said he had conscientious scruples against the

death penalty, irrespective of the verdict, the amount of testimony, or circumstances.

We have read the *voir dire* examinations of all jurors excused for conscientious scruples. The two instances stated illustrate extreme views. The views of the other excused jurors fall somewhere between.

The question is exhaustively discussed in *Rhea v. State,* 63 Neb. 461. In addition to the cases there cited, that case has been followed in *Pumphrey v. State,* 84 Neb. 636, and *Taylor v. State,* 86 Neb. 795, 805. In the last case, it is said: "It thus appears that this question is so well settled that a further discussion of it is unnecessary, and it must be resolved against the defendant's contention."

(B) It is next contended that the court erred in overruling defendant's challenge, for cause, of Juror Carey. This juror said he lived in University Place, heard of the case, had talked about it some with a relative of the deceased, who lived in University Place, two or three months after the first trial was over with; thought he had no opinion of guilt or innocence, and had no conscientious scruples against death penalty as long as it is in the statute, and would abide by the evidence; not acquainted with Carey family living in Bethany who were witnesses; never talked with any of them; slightly acquainted with Wilson family in University Place; talked with Mr. Wilson about the case; not intimate with him; never knew him until the summer of 1927; in real estate business in University Place 17 years; talked no more with Wilson than what had been in the papers; was assessor and, when doing that work, the case came up; thinks Wilson naturally evidenced a little bitterness, he being a relative, but did not exhibit a great deal of animosity toward Sharp; did not remember just what was said; thought "he told me no more than I had read in the newspapers;" from what he read and was told by Wilson, rather thought he formed an opinion at that time; it was not caused by what Wilson said, but by reading the newspapers only; thought it could be changed by

evidence, but felt that something would have to be shown to change his mind. The juror was then challenged and the court examined him. Thought he could put such opinion out of mind and enter upon the trial of the case without any opinion, and decide on the evidence just the same as though he had never had any such opinion; did not think he had a definite opinion, but would naturally have ideas as to what the evidence was; heard nothing but what he could decide on the evidence as given; may have had the facts confused, at the time he formed the opinion, "but, of course, I said I could decide on the evidence." Notwithstanding any view he may have had, based upon the reading of the newspapers, juror thought he could take his seat as a juror, hear the testimony, listen to the instructions, and forget all about any view he had upon it, or opinion, and consider the case upon the evidence and the instructions of the court, and felt absolutely certain he could do so, and could and would put aside any opinion or viewpoint he ever had, and enter upon the trial with such freedom of mind that would not require any evidence to be produced to put such a previous opinion out of his mind; he voted for Mr. Towle for county attorney. The challenge was overruled, and legally so, although we think the question here presented might well have been eliminated by the trial court in the exercise of its statutory discretion, in so serious a case where life is at stake. *Ringer v. State*, 114 Neb. 404; *Barker v. State*, 73 Neb. 469.

(C) The next error relates to instruction No. 5, given by the court. It is based upon the following words: "If you find beyond reasonable doubt that defendant purposely, intentionally, maliciously, deliberately, and with premeditation, killed his wife, * * * you will find him guilty of murder in the first degree," etc. The only complaint is the failure of the court to insert the words "from the evidence" after the words "reasonable doubt," claiming that the court gave the impression that the jury were at liberty to indulge in speculation and conjecture. We cannot

agree. The rule that instructions must be construed reasonably, in their entirety, is so well established that we no longer cite authorities to support it. The second paragraph of the instructions given plainly told the jury that one charged with a crime is presumed to be innocent until proved guilty beyond a reasonable doubt, "and, before you can properly find the defendant guilty, you must find that his guilt has been established by the evidence beyond a reasonable doubt." The next paragraph defines reasonable doubt.

The fourth paragraph states it is undisputed that Harriet A. Sharp was killed during the night of March 16 and 17, 1926, and the jury should "at once turn your attention to the question of who did the killing." Then follows the language complained of in instruction 5.

Paragraph 14 of the instructions says: "You should consider this case upon the evidence introduced and the law as given by the court." It is to be presumed that jurors are ordinarily intelligent men, and it is difficult to see how any such persons could understand, or be led to believe, that they were to speculate or engage in conjecture about the necessity of finding the defendant guilty, from anything but the testimony introduced upon the trial.

(D and E) The next errors complained of relate to the exclusion of a so-called deposition of Captain William Evans whose testimony was sought in Chicago. He refused to testify. As the record disclosed, there had been correspondence between Captain Evans and Mr. Beghtol, counsel for accused, concerning the palm prints of defendant's hands. His counsel state that, as Captain Evans was a world renowned fingerprint expert, had an opinion and had conversed with Carmody, a state witness, concerning the same, the so-called deposition should have been received to overcome any presumption that Evans entertained opinions adverse to the accused. They say defendant should have been permitted to show thereby that Captain Evans refused to testify, and they should have been permitted to

test the knowledge of the expert Carmody by using the opinions held by Captain Evans which were expressed in letter form. These are novel claims. Mr. Towle and Mr. Beghtol were present in court and both had personal knowledge of the refusal of Captain Evans to testify. To prevent an adverse presumption, as was feared, Mr. Towle could have been called to so testify. Besides, the record clearly shows Captain Evans' refusal. As to the correctness of the refusal of the court to allow questioning Carmody about the letter of Captain Evans, we entertain no doubt. The letter was not under oath; it was not in evidence; and, at most, would be hearsay. It might have been proper to question witness Carmody generally as to whether he knew the opinions of, and had talked with, Captain Evans; that they examined the prints together, and that the prints examined were properly identified, and, after talking with Evans, the witness was made less certain of his own testimony. Those matters could have been put directly to the witness, and they were, to a certain extent, but not fully pursued.

(F and G) The next assignments are (F) the refusal of the court to dismiss the information as to murder in the first degree, for insufficient evidence to show the defendant "deliberated and premeditated the crime," and (G) the evidence does not support the verdict. These two assignments may be taken together. Both depend upon the evidence as a whole.

Until now, we have not been troubled with any of the assignments. The principal question is as to the sufficiency of the evidence to support the verdict.

Preliminary to the discussion of the evidence, it may be well to state what is malice, deliberation, premeditation, and, incidentally, motive.

Murder, as defined by section 9544, Comp. St. 1922, in a case like this, is the killing of another "purposely and of deliberate and premeditated malice." The charge is that defendant "unlawfully, feloniously, purposely, and of a de-

liberate and premeditated malice," killed Harriet A. Sharp.

Malice may be said to exist when the heart is dead to social duty, bent upon prohibited mischief, and there is a deliberate mind to kill. 29 C. J. 1084, sec. 61; *Vollmer v. State*, 24 Neb. 838; *Carr v. State*, 23 Neb. 749; *Davis v. State*, 51 Neb. 301; *Housh v. State*, 43 Neb. 163. It is nothing more than the existence of a mental state, however sudden or abbreviated in point of time. *Francis v. State*, 104 Neb. 5; 29 C. J. 1113, sec. 97. Motive is not essential to prove malice, deliberation, or purpose. *Pointer v. United States*, 151 U. S. 396, 413. Malice may be shown by acts and the manner of their performance. Where the mind of the actor is sound, or rational, in the sense that it comprehends, the fact of killing, the manner of accomplishment, total absence of circumstances tending to show justification or mitigation may, and often do, show undeniable malice. When deeds result in killing, and can be interpreted in no other sense than cruel, brutal, savage and deliberate, they may establish unmistakable malice, whether or not motive is shown. Motive is not an essential element of murder. Its presence or absence is material in determining whether the killing was done by accused and was malicious and premeditated. If it appears that the accused killed his victim in a persistent, cruel and barbarous manner, without provocation or justification, malice, in the legal sense, is proved. In such case, proof of motive would not make guilt more certain.

The proofs in this case show that the deceased was beaten to death by fifteen or more blows from a hammer, owned and in possession of accused, which could not have been used for any innocent purpose. Deceased was defenseless. It is claimed that any one of the several blows would have killed, and, therefore, only the first can be considered in interpreting the state of mind of the accused. The statement does not seem to afford a foundation for judicial discussion. The case calls for a careful and patient inquiry.

The accused was about 50 years old. January 3, 1924, he

married deceased who had four children, three of whom lived with them until about 8 o'clock p. m. on March 16, 1926. During much of the intervening time, accused and deceased did not live in peace, but had many quarrels; during the day of the murder, they had been arguing and were unfriendly. Accused was "mad" when they left home between 7 and 8 o'clock in an automobile, ostensibly to go to a dance. They went to the home of one Wilson, a relative of deceased, in University Place, where they visited a few minutes, about 8 o'clock, in apparent good humor. From there, they started east. Neither was again seen by any witness until about 10:30 o'clock that evening, when accused appeared in the street near the home of one Carey a few city blocks northeast of the Wilson home, where he attracted attention by holloing and repeating he had been robbed of his coat, money, watch and wife. One Donohoe at the Carey home went into the yard and talked to accused, who was blindfolded and whose hands were bound behind him by heavy wire. The blindfold was tied in a tight, hard knot. In releasing the hands, Donohoe "just pulled" them apart, the wire being tight on the left hand, but loose on the right.

Accused went into the Carey home; cold beads of sweat were standing on his face; he was shivering and seemed very cold; exhibited hands and wrists to witnesses, calling their attention to marks; they saw no blood.

Accused then went, three times, with officers, over the route he said he was taken by robbers, claiming he could follow the course by reason of the motion of the car in its turnings, and because of rough places, street-car tracks and elevated sidewalks over which they passed. At times, he directed, in advance of reaching turns, crossings, tracks and walks, where to make turns. He said he had been robbed of *all* of his money. The following morning, he borrowed a dollar with which to purchase breakfast, saying he had no money. When officers removed his clothing, they found four $1 bills in his trousers watch-pocket, which

he later explained by saying, on some prior occasion he and his wife attended a dance and found when he changed his trousers he had no money, and then made up his mind he would not be caught in that fix again, so he put $4 in his trousers watch pocket for future emergency.

He said he and wife left the Wilson home about 8:15 to 8:20, going east; his wife spoke of a flat tire; he turned south, one house was "all lit up," and he said to his wife, "We will stop in front and look at the tire;" got out of his car; a car came from the south and stopped; a man said, "I'll fix it for you, you get back in the car," and stuck a gun on him; the man told accused to drive; he got behind the wheel and two men got in; when the man with the gun got in, accused's wife looked around and said, "My God" or "My goodness," and collapsed; they drove 200 feet beyond a culvert and was told to stop; accused had been ordered to take off his overcoat, and a man said, "I will take care of that overcoat," and took it; another fellow in the car said, "Take off your coat and vest," which he did; he was then ordered to "Take off your shirt;" accused took off his collar, tie and shirt and handed them over, and then asked, "Can't I put my coat and vest back on?" and the man said, "Yes; I guess so;" accused did so and handed the man the overcoat; then another car drove up behind "just as I was handing my overcoat to him;" the other man took the overcoat, so accused could not see him, and put it over the lights of the other car; the man tore up the shirt of accused; accused put on his coat, vest and necktie and buttoned up the vest; then the other man blindfolded him; accused had $4 in the watch pocket, and the robbers took $12.25 or $12.35 from his pants pockets; was in the front seat of his own car when blindfolded; robbers took his money right after he was blindfolded (before that, he testified he didn't know whether they took his money or watch before or after he had been blindfolded). One man ordered him out of the front and into the back seat of the car, and there searched him. The man first

wired one hand and then the other. One man got into the car and sat in the back seat with him; tramped on his feet; the man drove around with accused and Mrs. Sharp; one man said, "Head toward Omaha;" drove around 15 or 20 minutes after they got to going; did not know exactly where he was put out of car.

In trying to get out of the car, accused struck his wife's head; was told to "Get out of here;" as he got out, he slipped and bumped nose on side of the car; blindfold was then over both ears and eyes; had feet between seats to brace himself; one man reached across and put his knees against accused's leg and was doing something with accused's wife; accused could feel, by the spring of the seat, man was surging; car sounded like it struck the "X" with a thud; last heard the thud when man quit surging; man was doing something with wife when he had his knees against accused; man was pushing wife against leg of accused; did not hear any blows struck; the commotion happened twice, the first not very long after man got in the car; drove 10 or 12 blocks; went over a high sidewalk, rougher than before, and the same things happened again; still blindfolded when accused last got out of car; when accused got feet on ground, man said, "Stay here and we will be back, and if you are not here we will fill your hide full of bullet holes, so it will not hold shucks;" then the man closed the car door and drove away; accused heard another car stop a little way off; after the car passed, accused got into the center of the road, scraped his feet along until he found the road where a car had been during the day when it was thawed out; stood five or ten minutes and heard two cars go by to the north, then went about a block; heard street-car; followed the track back south to where he heard the street-car; then heard a dog; tried to release himself; didn't try to do much, as there was nothing he could do; went a little further and heard a door shut; holloed 12, 15 or 20 times, and a lady answered, who turned out to be Mrs. Carey; Donohoe took the bandage off and

accused asked him to take the wire off; denied that the blood spots were found on any of his clothes except his vest; when the officers spoke of blood, he did not tell them of slipping and striking his nose on the car, or hitting against his wife's head; hurt his nose when he slipped and fell (at that time, the nose was covered with the blindfold, and there was nothing visible to show there was any blood on the blindfold). Accused claimed the robbers turned round at a certain place in the road, describing it. A witness, with a flashlight, examined the road and there were no tracks, although the grading was fresh.

While at the Carey house, accused spoke of having $4 in his watch-pocket, saying he did not know whether the robbers got it or not, and then pulled out the money and showed it to witnesses, and put it back in his pocket, indicating that he knew of the $4 before he borrowed the $1 for breakfast.

At a creek bank, not far from the place where the death car was found, foot-prints were discovered, which were measured and were practically the same as those of accused. The shoes of accused fitted into the tracks, and they corresponded.

Accused was put out of the car and left by the robbers not far from the Carey home.

Before the body of deceased was found, but after accused felt he was suspected, one Jones asked him where he got all of the blood on him, and was told, "I don't know, but it didn't come off of that woman." There were blood spots on several garments and shoes; some blood had soaked through the trousers onto the underclothing; the car and body were found about 4½ miles north of Carey's place; a flashlight, which one witness testified belonged to accused, was found buried in loose earth around a telephone pole. Senator Jeary experimented with tracks made by Sharp's shoes, and compared them with foot-prints found near the creek bank. He testified they were exactly the same.

The death car was found in front of Schmidt's place, near which there was a puddle of blood; at 8 p. m., on the night in question, it was not there. Schmidt's sister visited him between 8 and 9:20 p. m. at his home; car was not there at 8 p. m., but was there about 9:10 to 9:20, and was there the next morning. The distance from the point, where accused said the robbers put him out of the car to the Carey house is three or four blocks. The distance traveled from the Wilson home, over the route followed by robbers, to the place where accused was last put out of the car is about 50 blocks, or about 3 1-2 miles. To walk from the latter place to the Carey home, as nearly as we can judge, accused had from 9 o'clock, or a little before, until 10:30. To walk from where the death car was found, if accused was there, he would have had approximately from 9:10 or 9:20 until 10:30. Some time was spent by the accused with the robbers—perhaps 25 to 35 minutes, according to his own story. According to the testimony of others, the death car had reached Schmidt's place not later than 9:20 p. m.; so, within about one hour from the time the accused left the Wilson home (about 8:10 or 8:15), the death car was seen at the Schmidt place. Palm prints of the hand of accused, connecting him with murder, were proved.

There are other facts and circumstances shown, of more or less minor importance, which we will not attempt to detail.

As against the foregoing, we have the unsupported testimony of the accused and a few speculative circumstances of little import. The robber theory is not convincing. So far as known, the deceased was assaulted only while she was being murdered with hammer blows, and had no money about her. There is no intimation that any one suspected deceased had money. No greater motive or reason for murdering deceased than the accused is even suggested. Accused had some opportunity for identifying the robbers, as they were in front of the house "all lit up," at least as much as did deceased. If the murder was com-

mitted by robbers, their actions were most peculiar. The accused first stopped his car for the purpose of looking at a flat tire. That must have taken a minute or so. Two robbers in a car, accused said, drove up and stopped. They were there with the accused and deceased alone for a time; then came a third car, with another robber who seemed to know precisely what was going on and what was expected of him by his associates, his conduct being such as would indicate a connection with the other two robbers. The first two robbers were not alarmed by the appearance of the third. The third robber apparently pursued the same objective as the first two.

The third robber could not have worked in such perfect harmony with the others without predeliberation. It is inconceivable that three men would jointly follow a predetermined sexual assault.

The story of the accused is hard to reconcile with any common sense view of the evidence. No person was seen with the deceased, or known to be with her, between 8:20 and about 9 o'clock, when the death car was found before Schmidt's home, except the accused. That the deceased fainted on sight of the robbers, and no blows were struck while accused was with the wife, is significant. If robbery was the motive, it could have been accomplished without resistence or alarm from an unconscious woman. If it be suggested that another kind of assault was intended, it would seem ridiculous to say that three men would join in such an aggregated and conglomerate prosaic act.

The jury having heard the evidence and reached its conclusion, a most rational one, it is not for this court to disturb their verdict. The accused served a felony term a number of years ago in the penitentiary of this state. While we do not attach much importance to that incident, yet, when taken with all the other facts and circumstances and seeing and hearing accused testify, it was a matter for the jury to consider in determining his credibility. A prior jury, having heard practically the same testimony,

came to a like conclusion. They were the triers of fact, made so by law.

While the writer of this opinion has no fondness for capital punishment, he has neither inclination nor desire to evade responsibilities imposed by law. In *Deerkop v. State,* 196 Wis. 571, decided May 8, 1928, a conviction of first degree murder was affirmed on circumstantial evidence showing far more weakness than the evidence before us, but having some similarity. The court concluded with this language: "If the story of his whereabouts * * * appeared to be a fabrication, the jury were warranted in believing that the defendant and the deceased repaired to Williams Lake * * * and that the defendant came away * * * after the deceased had been murdered." This is applicable to defendant's story that he was not in the vicinity of the death car in front of Schmidt's place on the evening of the murder. If the foot-prints found a short distance from the death car were made by accused, then, of course, his story was a fabrication. If it be conceded that the accused murdered his wife, it would be difficult to find a more fitting occasion for the application of the death penalty than is here presented. We must concede that he did. The jury have so found. They fixed the penalty of death, as they had a legal right to do. Accused has had a fair trial, free from error, even of a technical character. The verdict of the jury and the judgment of the district court are approved and affirmed, and Friday, the 19th day of October, 1928, between the hours of 6 o'clock a. m. and 6 o'clock p. m., of said day, is fixed as the date for carrying into effect the sentence of the district court.

AFFIRMED.

W. G. SUMMERS, APPELLEE, V. AUTOMOBILE INSURANCE COMPANY OF HARTFORD, APPELLANT.

FILED JUNE 27, 1928. No. 26130.

1. **Insurance: PLEADING: WAIVER.** Waiver of the terms of a hail insurance policy is an affirmative defense, which, to be available, must be pleaded.

2. ———: DIRECTION OF VERDICT. In an action against an insurance company for recovery of loss of crop under the terms of a hail insurance policy, where there is no evidence of value of the crop destroyed, it is the duty of the court to direct a verdict for defendant.

APPEAL from the district court for Garfield county: BAYARD H. PAINE, JUDGE. *Reversed.*

Montgomery, Hall, Young & Johnsen and *Davis & Davis*, for appellant.

B. A. Rose and *E. M. White, contra.*

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

BEGLEY, District Judge.

Action to recover damages for partial loss of crop under terms of a hail insurance policy. Answer admitted insurance under the policy, but alleged that it contained a provision that the company was not liable for loss unless sworn proof of loss should be furnished the company within 60 days after such loss, setting forth specific information relative to the loss, and that this was not done. Reply was a general denial. On the trial the defendant moved for a directed verdict both at close of plaintiff's evidence and at the close of all the testimony, which were overruled. The jury returned verdict for plaintiff for $367.50, the amount sued for. From a judgment on which defendant appeals.

The plaintiff's evidence showed that he made no sworn proof of loss as provided by the terms of the policy, but that he notified defendant's agent the day after the loss, who wrote a letter to the company, and later a man appeared at the place claiming to represent the company as an adjuster, but he went away without making such adjustment. Plaintiff contends this constitutes a waiver, but his difficulty is that he has not pleaded a waiver and therefore is not entitled to prove one. A waiver must be plead-

ed and cannot be proved under a general denial. *Sweet v. Antelope County Farmers Mut. Ins. Co.*, 91 Neb. 561.

Appellant complains of the insufficiency of the evidence to prove a loss or damage. The only evidence of damage was given by B. F. Ulm, a witness for plaintiff, who testified that in his opinion the corn crop was damaged between 30 and 35 per cent. and oats and rye between 40 and 50 per cent. There is not a word of testimony as to the number of bushels damaged or destroyed or the market value thereof, and the verdict can only be based on conjecture. The method of proving damages for loss or destruction of crops is set forth in *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, and *Pulliam v. Miller*, 108 Neb. 442. The motion for directed verdict should have been sustained on this ground.

The trial court, inadvertently perhaps, in its opening instruction instructed the jury as a fact "that there is now due and owing this plaintiff from the defendant insurance company the sum of $367.50," instead of stating that same was made as the claim of the plaintiff. In view of the fact that there was no evidence of damages, this was prejudicial and is doubtless what caused the jury to make the finding which they did.

For the foregoing reasons, the judgment is reversed and the cause is remanded for new trial.

REVERSED.

STATE OF NEBRASKA V. ART BOYD.

FILED JUNE 27, 1928. No. 26579.

1. **Criminal Law: WRIT OF ERROR: PLEADING.** Even if the right to a writ of error *coram nobis* exists in this state, which is not decided, a petition, which as ground for its issuance states only a fact which was known to the party applying before the judgment attacked was rendered, is insufficient.
2. ———: ———. A writ *coram nobis* does not lie to bring into the record facts known to the applicant before judgment, and

which he negligently or intentionally failed to bring to the attention of the court.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed and dismissed.*

O. S. Spillman, Attorney General, Lloyd Dort and *George Heinke,* for plaintiff in error.

Dale P. Stough, contra.

Heard before GOSS, C. J., THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

Application for a writ *coram nobis.* The facts necessary for a proper understanding of the question submitted are as follows: The applicant, Art Boyd, hereinafter referred to as defendant, on November 15, 1924, was sentenced by the district court for Otoe county to the penitentiary of this state to serve not less than three years nor more than ten years for the crime of burglary. He was thereafter committed to the penitentiary and there remains. On February 17, 1928, he filed this application for a writ *coram nobis* to correct said judgment and sentence on the ground that the same was erroneous in this, that the court should have pronounced a determinate sentence—one for a definite period of time. It appeared upon the hearing of the application that the defendant, prior to his conviction of the crime of burglary, had been confined in a penitentiary in the state of Iowa; that this fact was not known to the judge pronouncing sentence and did not appear of record in that proceeding at the time sentence was passed.

Under the statutes, the period of punishment for the crime charged was from one to ten years, the term to be fixed by the trial court; but by section 10248, Comp. St. 1922, the court was given power to impose an indeterminate sentence: "But the court imposing such sentence may in its discretion and providing such person has not previously been confined in any penitentiary impose upon such

person an indeterminate sentence." This indeterminate sentence might be for any period within the minimum and maximum periods provided as penalty for the crime charged. The writ was allowed by the district court April 4, 1928, and corrected judgment entered sentencing defendant to the penitentiary for a period of five years from and after November 15, 1924, and the state appeals. Two questions are presented by the record:

(1) Does the common-law remedy by writ *coram nobis* exist in this state?

(2) Do the facts shown by the record present a proper case for the allowance of the writ?

1. The first question is one of great importance and interest, and is new in this jurisdiction. Its decision presents alluring opportunities for a display of learning and research not often offered in these practical times, but we must decline to enter the attractive field of its discussion for the reason that it is not necessary for the proper disposition of the case before the court. Two reasons for our refusal will be readily understood: First, the expenditure of time, space and labor upon a question not affecting the rights of the defendant; and, second, the authority of a decision under such circumstances would be subject to question as a precedent.

2. For the purposes of this case it may be assumed that the remedy exists, and we are now to determine whether the case presented is a proper one for its application. The purpose of the writ is to bring into the record a fact not already there and unknown to the court, which, if it had been known, would have resulted in a different judgment than the one pronounced. It would seem, therefore, that the case presented complies with the conditions above noted. It is conceded that the fact of the defendant's previous confinement in the penitentiary does not appear of record and was not known to the judge pronouncing sentence. But the cases seem to be of one accord upon the proposition that, before the writ will issue, it must appear that the failure of the record to show the fact in question

was due to no negligence of the party applying and was unknown to him. 16 C. J. 1326, sec. 3118; *Bennett v. State,* 106 Miss. 103; *Bigham v. Brewer,* 4 Sneed (Tenn.) 432. Or where the party was prevented from asserting or enjoying some right through duress, fraud, or mistake. *Wheeler v. State,* 158 Ind. 687; *State v. Stanley,* 225 Mo. 525. And *Marble v. Vanhorn,* 53 Mo. App. 361, in which it was said: "There is another important rule found in this branch of the law, viz., that where the party complaining knew the fact, or might have known it, and failed to bring it to the attention of the court, he cannot afterwards do so"—citing 3 Bacon's Abridgements, 375.

The reason for the rule is apparent. If the defendant has knowledge of a fact which, if divulged, would be for his benefit, he should not be permitted to conceal such fact, take his chance upon the issue, and, being disappointed therewith, ask the court to relieve him from the consequences of his own intentional or negligent act. To allow such procedure would countenance trifling with the courts to an extent very much greater than their tenderness for the rights of persons accused of crime already has permitted. It is presumed that defendant and his counsel knew the law, and if it was thought to be to his advantage that a determinate sentence be pronounced against him, it was his duty to advise the court of the fact which would entitle him to such sentence. He had ample opportunity so to do when inquired of by the judge, as was his duty under the statute, whether he could show any cause why the judgment of the court should not be pronounced against him. He made no showing, and the court pronounced sentence in exact conformity with the statute. This judgment was regular in form and was without error so far as appeared from the record. Had the fact now sought to be brought into the record appeared therein, the judgment would have been erroneous and subject to reversal upon appeal by defendant, but being regular upon its face, and in a case of which the court had jurisdiction of the subject-matter and the person of the defendant, it was not

void. We so held in *Hulbert v. Fenton*, 115 Neb. 818, where an indeterminate sentence had been pronounced upon a defendant who had been previously confined in a penitentiary, but which fact did not appear upon the record. That was an application for a writ of habeas corpus, but is equally applicable to the present proceedings.

It is argued by defendant: "It will hardly be presumed by this court that, unless appellee, the defendant, was asked concerning his past life or former career, he would have had an opportunity or would have known how to rise up in court and voluntarily pour into the ears of the court the details of his past life." The point is not without force, but we think there *is* a presumption that, prior to the final act of the drama, the defendant would bring to the notice of the court any facts concerning his career which would be for his benefit or advantage in the critical situation in which he was placed. He now appears to have discovered that the fact in question, if known, would have resulted in a more lenient sentence; the controlling fact was one of which he alone, apparently, had knowledge; it was his right and privilege to make it known to the court, and it is now too late to secure the benefit of it.

The judgment of the district court is reversed and proceedings dismissed.

REVERSED AND DISMISSED.

RAY A. WISNER, APPELLEE, V. MORRILL COUNTY, APPELLANT.

FILED JUNE 27, 1928. No. 26417.

1. Taxation: DELINQUENT TAX LISTS: RATES FOR PUBLICATION. Section 2407, Comp. St. 1922, providing compensation at the rate of ten cents a line for the first insertion and eight cents a line for subsequent insertions, governs the rate to be charged by newspaper proprietors for publishing the delinquent tax lists, rather than section 6052, which is a portion of the revenue law, and only provides the amount to be charged back by the county to the delinquent taxpayer.

2. ———: ———: ———. The legal rate for printing is only a maximum rate, and a county should be permitted to show that a lower rate has been agreed upon for the publication of delinquent tax notices.
3. ———: ———: FORM OF PUBLICATION. A newspaper should publish the delinquent tax list in the form submitted by the county treasurer.

APPEAL from the district court for Morrill county: EARL L. MEYER, JUDGE. *Reversed, with directions.*

C. G. Perry, for appellant.

Coulter & Atkins, contra.

Heard before GOSS, C. J., ROSE, DEAN and THOMPSON, JJ., and CHASE, REDICK and WHEELER, District Judges.

WHEELER, District Judge.

This action involves a dispute between a newspaper proprietor and Morrill county, Nebraska, over the proper charge for printing a delinquent tax list. The appellant, Morrill county, claims that the printing charge is governed by section 6052, Comp. St. 1922. This statute is a part of the revenue law, and after providing for the publication of the delinquent tax list states: "The treasurer shall add to each description of land so advertised, other than town lots, the sum of twenty cents and for each town lot the sum of ten cents, to defray the expense of advertising, which sum shall be added to the total amount due on such land or town lot for taxes and collected in the same manner as taxes."

The county is in error in its contention that this section prescribes the legal rate to be charged for printing. This section merely provides the charge to be made by the county against the delinquent taxpayer to reimburse the county in part for the cost of printing the tax list.

Section 2407, Comp. St. 1922, provides the legal rate for the publication of notices—ten cents a line for the first insertion and eight cents a line for subsequent inser-

tions. Figured under section 2407, appellee's compensation should be $711.98, as appellee claims, instead of $326.64, as the appellant claims under section 6052.

The judgment, however, must be reversed because of the refusal of the district court to permit appellant to introduce evidence to show the agreement of the parties as to the rate to be charged. The legal rate prescribed under section 2407 is only a maximum rate, or a rate which applies in the absence of a specific agreement. The entry in the record of the county commissioners of Morrill county for the year 1926: "There being no bids on file for county printing, the different newspapers were represented in person, asking for the full statutory rate for all work done. The board designated the Bayard Transcript and the Broadwater News the official papers for the year 1926, which includes the commissioners' proceedings, treasurer's semi-annual statement, and delinquent tax list" —does not constitute a contract between the county and the newspaper proprietors. In the absence of any contract the legal rate for publication of notices, as set forth in section 2407 of the statutes applies. As was said in *Phœnix Ins. Co. v. McEvony,* 52 Neb. 566: "We know of no law which compels a printer to charge the full legal rate." The cases cited by appellee, *Kemerer v. State,* 7 Neb. 130, *State v. Roderick,* 25 Neb. 629, and *Logan County v. Doane,* 34 Neb. 104, as prohibiting any variation from the prescribed legal printing rate, do not apply to the case at bar. These cases merely hold that there can be no variance in the fees prescribed for a county clerk, county treasurer, and sheriff. There is no reason why the county by special agreement should not have its printing done as cheaply as possible; either by letting the same at a public bidding or by special contract.

It was the duty of the newspaper to publish the list exactly as submitted by the county treasurer, consequently the computation of the lines as 5,102 was correct. The published tabulation was a convenient form, and on the whole it was better to place the word "Block" at the top of

the column and the list of lots thereunder than to describe each parcel with its block as well as the lot number.

Reversed and remanded to the district court, with directions to take further evidence, to apply the rate prescribed in section 2407, if no special contract is proved, and to apply the contract rate if a contract is shown.

REVERSED.

OSCAR PETERSON, APPELLANT, V. CITIZENS BANK OF STUART, APPELLEE.

FILED JULY 2, 1928. No. 26061.

1. **Chattel Mortgages**: CONSTRUCTION. A chattel mortgage, describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period.
2. ———: ———. Calves, running with their mothers at the time their mothers are mortgaged with other cows, and where the mortgage includes the increase from the cows so mortgaged, are not contemplated by the law as increase; and the mortgagee does not thereby obtain a lien on such calves so in existence at the time the mortgage was made.
3. ———: ———. Calves running with their mothers are cattle and are included under that description in a chattel mortgage made by one who in the mortgage expresses the intention of including therein all his cattle, branded and unbranded.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

D. L. Jouvenat and *William M. Ely*, for appellant.

J. J. Harrington, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

GOSS, C. J.

This is an action to recover damages for the alleged conversion of chattel mortgaged property. A jury was waived

and the case was tried to the court. The court found for defendant. Plaintiff appealed from a judgment dismissing the case.

The case was tried on stipulated facts preserved in the bill of exceptions. The errors assigned and argued relate to the insufficiency of evidence to sustain the findings and judgment, and that it is contrary to law.

The controversy is over certain calves and arises out of chattel mortgages given to the respective parties by George Hytrek. The appellee's mortgage was prior in time. It was made March 23, 1925, and filed the same day. Without going into fuller details here because of later stipulated facts which will be referred to in their order, we derive from the stipulation that the mortgage covered 147 or more head of cattle, 78 of which were cows, 10 were two year old heifers, and 23 were heifers one year old. The mortgage contained this statement: "It is also intended that this mortgage shall include all the increase from the above cows and heifers."

The appellant's mortgage was made and filed July 1, 1925. It covered 55 calves born in the spring of 1925. The mortgage contained this statement: "This mortgage is given to cover the calves * * * that I own at this time."

On September 22, 1925, appellee took possession of 48 of the 55 calves and sold them. Both parties claimed a first lien on the 48. They stipulated that the 48 calves were worth $1,000 and that appellee has never paid that sum or any part of it to appellant; that the 55 calves covered by appellant's mortgage were all born to cows included in appellee's mortgage but none had been born except four or five that were two or three weeks old when that mortgage was given on March 23, 1925; that nine and a half months is the natural period of gestation; that the remainder of the 55 calves were conceived prior to the mortgage but were born between its date and August 1, 1925; that the 48 calves that were sold by appellee were continuously suckled by their mothers, ran with their mothers and were sold with them at public auction; that at the time of

the trial there was still due the plaintiff (appellant) on the debt secured by its mortgage $1,649.93, and there was still due defendant (appellee) on the debt secured by its mortgage "more than $1,600;" and "that the sole question in this case is, who has the prior lien, the plaintiff or defendant, on said calves and increase."

Appellant argues in his brief that his chattel mortgage was definite in its description and covered 55 calves then born and existing; while the mortgage of appellee was indefinite and is sought to be extended over five of the calves already born at the time of the execution of appellee's mortgage and therefore required to be definitely described; and is sought to be extended over the rest of the 48 involved, not in actual existence when the mortgage was executed and indefinitely described as "increase." This contention requires a legal definition of "increase" as applied to such a case.

Webster, New International, describes "increase" as "Multiplication by production of young;" Standard—"Increment by generation; progeny."

It was held in *Cole v. Kerr,* 19 Neb. 555, that the lien of a chattel mortgage on a crop of corn not planted will not attach to the crop even when it comes into existence unless possession is taken by the mortgagee. The reason for the rule is that the thing mortgaged has no existence. In *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825, in an opinion by Sullivan, J., it was held that things which have no actual nor potential existence are not the subject of chattel mortgage; and that, within the meaning of this rule, animals which have neither been littered nor conceived are without actual or potential being. In the body of the opinion the court expressly stated that it did not decide whether a mortgage given during the period of gestation covered the increase. The mortgage in that suit covered the increase but it was given prior to the period of conception. So it appears, in the absence of any of our cases cited by the parties or found by us, that the precise

question involved is one of first impression in this jurisdiction.

The following cases serve to illuminate the question: *Holt v. Lucas,* 77 Kan. 710, holding that a chattel mortgage on domestic animals expressly covering the increase, executed during gestation, creates a lien upon the increase; *Rogers & Dewey v. Highland,* 69 Ia. 504, sucking colts of mares mortgaged before the colts are foaled are covered by the mortgage until they are weaned; *Funk v. Paul,* 64 Wis. 35, where domestic animals are mortgaged during the period of gestation the offspring when born will, as between the parties, be covered thereby; but as against a *bona fide* purchaser or incumbrancer, acquiring his title or lien without notice after the period of nurture has passed, such offspring will not be covered by the mortgage; *Darling v. Wilson,* 60 N. H. 59, the effect of a mortgage upon a mare with foal born later is to create a lien upon the foal when born but the lien does not continue beyond the period requisite for the suitable nurture of such increase; *Edmonston v. Wilson,* 49 Mo. App. 491, when the owner of a mare gave a mortgage on her and described her therein as with foal the mortgagee will, as against the mortgagor, be entitled to the colt when born; *Libert v. Unfried,* 47 Wash. 186, a mortgage, upon 1,200 head of ewe sheep and their increase and upon 300 head of wether sheep, results in a construction of the words "and their increase" as applying "merely to the increase of lambs from ewes" and not to include the clip of wool from the sheep.

It seems to us, upon consideration of the facts stipulated by the parties, of the general principles affecting them, and of the precedents in other courts, that the true rule to apply here is this: A chattel mortgage, describing cows and their increase, made during the period of gestation, creates a lien upon the calves resulting from such gestation and continues such lien while the calves are being nurtured by their mothers during a reasonable period.

This disposes of questions raised as to such of the calves

as were born after the mortgage to appellee was executed, by determining that they were increase and were covered by the lien of the mortgage. This accounts for 43 out of the 48 calves disposed of with their mothers by the appellee. But there were five calves concededly born prior to the date of the mortgage to appellee and running with their mothers at that time. Appellee contends that they were described in its mortgage and are included under the definition of "increase." They were definitely described and included in the 55 calves covered by the mortgage given to appellant. We are not disposed to decide the five calves came properly within any definition of "increase" as understood through our study and discussion of that term. These five calves had a definite existence of their own at the time the mortgage to appellee was made. We direct attention to a further description of the cattle in that mortgage not abstracted from the description in the stipulation on the first page of this opinion: "One hundred and forty-seven head of mixed cattle or more, it being my intention to include in this mortgage all of my cattle, branded and unbranded; seventy-eight head of cows," etc. Webster defines cattle: "Collectively, live animals held as property but raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses and swine." Without going into detail, we refer to Words & Phrases, where there appears nothing in the definitions taken from legal cases that would limit the use of the word "cattle" to bovines of any particular age. It is a collective noun and when the mortgagor described all his cattle it was sufficient to bind the parties to the mortgage and to impart notice to all those having notice of the mortgage that the calves then running with their mothers were included in the mortgage.

For the reasons stated we are of opinion that the judgment of the district court was right and it is

AFFIRMED.

IN RE ESTATE OF JENNIE GRINNELL.
JOSEPH B. REDFIELD ET AL., APPPELLEES, V. GEORGE WIXON, APPELLANT.

FILED JULY 2, 1928. No. 26094.

1. **Adoption**: RIGHT TO INHERIT. "The right to inherit property of a deceased person is created by statute. The legislature may confer upon adopted children and adoptive parents the right to inherit, each from the other." *In re Estate of Enyart*, 116 Neb. 450.
2. ———: ———. The act of 1897 (Laws 1897, ch. 94), providing for the adoption of minor children, of which section 1572, Comp. St. 1922, is a part, preserved the adoption of children theretofore adopted and gave the right to inherit from their adoptive parents to such adopted children as were not precluded from inheritance by the terms and conditions of the proceedings by which they were adopted.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

John P. Breen and *Magney & Magney*, for appellant.

Nickerson & Nickerson and *William R. Patrick, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and HOWELL, JJ.

GOSS, C. J.

George Wixon appeals from a final order of the district court decreeing that John B. Grinnell and Joseph B. Redfield are his co-heirs at law of Jennie Grinnell, deceased, affirming the judgment of the county court to the same effect in the final decree and distribution of her estate.

The appellant is a son of Jennie Grinnell by a prior marriage. She died intestate on May 19, 1925. Her husband, Adelbert Grinnell, died intestate March 9, 1924. Wixon contends that he is her only heir. John B. Grinnell and Joseph B. Redfield were adopted by Adelbert Grinnell and Jennie Grinnell by proceedings in the county court of Sarpy county, Nebraska, ending in a decree of adoption Septem-

ber 20, 1884. They are twins and were born August 23, 1882. They contend that, under their adoption and under the laws relating to inheritance, they are entitled to take as heirs of Jennie Grinnell.

John B. Grinnell, now of St. Louis, lived with his foster parents until about 1919, when he left Sarpy county. When the boys were seven or eight years old, they went to Box Butte county, where their foster parents took up a homestead and where they lived about six years. The appellant remained out there and married, but the Grinnells and the two younger boys returned to Sarpy county. When John B. Grinnell was 12 years old he heard a rumor one day in school that he and his brother were adopted children and the first real knowledge he had of it was from his mother (Mrs. Grinnell) on his return from school that day. John B. Grinnell attended the Nebraska Agricultural College for two years, and after he came home and took up the farm work in place of Joseph the latter went to the University, worked his way through and was graduated in the medical department. Until he was 25 or 26 years old he went back during the summer months and assisted with the farm work. He never knew until about the time he went to the University, when 19 or 20 years old, that he was an adopted child. He had an older brother, Willis Redfield, a physician, likewise an adopted child, who had gone by the name of Ryan but had assumed his original name. This brother invited him to go into partnership with him at North Platte and suggested that he assume his original name of Redfield, to do away with explanations, which he did, and the two practice medicine there together. We take pleasure in saying that there is no indication in the record, the briefs or in the oral argument to show other than the finest filial relations between the adopted children and the adopting parents, nor is there any suggestion of ill feeling between the adverse parties to this suit. When Adelbert Grinnell, the adoptive father, died, Jennie Grinnell, the adoptive mother, filed a petition in the county court reciting that the appellees were sons and heirs and

requested that John B. Grinnell be appointed as administrator. He acted as such and the final decree ordered their certain shares of the estate remaining to be distributed to appellees as heirs of the deceased.

The mother, Catherine Redfield, widow of Willis C. Redfield, had the lawful control of the children at the time of their adoption. The law governing adoptions in force in 1884 when these two children were adopted is found in General Statutes, 1873, ch. 57, secs. 796 to 801. Section 797 required from the mother a statement in writing before the probate judge where the parties desiring to adopt a child reside that she voluntarily relinquished all right to the custody of and control over such child and all claim and interest to the services and wages of such child "to the end that such child shall be fully adopted by the party or parties (naming them) desiring to adopt such child, which statement shall be signed and sworn to by the party making the same, before said probate judge, in the presence of at least two witnesses; and the person or persons desiring to adopt such child shall also make a statement in writing, to the effect that he, she, or they freely and voluntarily adopt such child (naming him or her) as their own, with such limitations and conditions as shall be agreed upon by the parties, which said statement shall also be signed and sworn to by the parties making the same before said probate judge, in the presence of at least two witnesses: Provided, in all cases where such child shall be of the age of fourteen years and upward, the written consent of such child shall be necessary to the validity of such proceeding: And provided further, whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child, and bestow upon him or her equal rights, privileges, and immunities of children born in lawful wedlock, and such statement shall be filed with and recorded by said probate judge, in a book kept in his office for that purpose."

Section 800 is as follows: "All decrees entered in such

case in conformity with the provisions and requirements of this chapter, shall be conclusive upon all the persons interested in such proceedings or matter, and the child or children thus adopted shall take the surname of the person or persons adopting the same, and all relations of parent and child, agreeably to such stipulations and the decree of the probate court, shall attach, and such child or children, if so stated in such decree, shall be subject to the exclusive control and custody of such parent or parents, and shall possess and enjoy all the rights, privileges, inheritance, heirships, and immunities of children born in lawful wedlock."

Catherine Redfield executed her statement in the proper form and the Grinnells duly executed theirs, a portion of which we quote: "Now comes the said A. Grinnell and Jennie Grinnell and represent to the court that they are residents of the county of Sarpy and state of Nebraska and that they are husband and wife; that they have seen and know John B. Redfield and Joseph B. Redfield, the minor children of Catherine Redfield, and they are desirous of adopting said minor children and agree and promise the said mother of said children that, in consideration of relinquishment of any and all interest or right to said children, and their services, they will adopt said children as their own and said children will assume the name of adopting parents, and will provide for them in sickness and health, suitable food and clothing and use their endeavors to teach or cause them to be taught in the rudiments of an English education."

On a hearing a decree was entered by the county judge, from which we abstract the following: "It is ordered, adjudged and decreed by me that the rights to the custody of and possession, power and control over the persons of the said John B. Redfield and Joseph B. Redfield by Catherine Redfield, their mother, shall cease from this date, and that the said John B. Redfield and Joseph B. Redfield shall be the adopted children of the said A. Grinnell and Jennie Grinnell, according to the several

statements made herein; and it is further ordered and decreed that the name of said children from and after this date shall be John B. Grinnell and Joseph B. Grinnell and that the said children shall be instructed in the rudiments of an English education."

In 1897 the legislature passed an act to provide for the adoption of minor children and repealed sections 796 to 801, as previously existing. Laws 1897, ch. 94. Section 9 of the act is carried forward into section 1572, Comp. St. 1922, without change, except those arising by reason of minor typographical editing, in the following words: "Unless the terms and conditions in such consent and petition otherwise provide, the person or persons adopting, and the child adopted shall after adoption, sustain toward each other the usual relation and the adopted child shall have bestowed upon him or her equal rights, privileges and immunities of children born in lawful wedlock, of parent and child, and shall have all the right and be subject to all the duties of that relation, and the parents of such adopted child shall thereafter stand relieved of all parental duties toward, and all responsibility for, said minor child, and shall have no right over it."

The only controversy in this case is one of law. It depends on the proceedings and the law in effect in 1884, at the time of the adoption, and the later change of that law in 1897, prior to the death of Jennie Grinnell. The appellees contend that by the decree of adoption and by estoppel alleged against Jennie Grinnell and forwarded as against her natural son, the appellant, they had the right to take their distributive shares of her estate irrespective of the act of 1897; and that, under the latter act, the legislature gave them the right to inherit if they did not already have it. On the other hand, the appellant takes issue on both contentions. He admits that the adoption in 1884 was effective in all respects save to clothe the appellees with the right to inherit; he claims their status was fixed so that they could not inherit, and he asserts that the act of 1897 does not apply to them and

was not intended by the legislature to apply to those already adopted prior to its passage. In his briefs and in the oral argument he declared that, if the act of 1897 is operative so as to change what he regards as the fixed status of the appellees, it would end the case. So we examine that proposition first.

The effect of the act of 1897, in some of its phases, was recently before us for determination. There was involved the question whether the natural father should inherit from his son or whether the adoptive mother of the decedent should inherit to the exclusion of the natural father. The adoption of the child took place after 1897 and of course his estate devolved later. We held that, in the case of the unrestricted adoption of a minor child, section 1572, Comp. St. 1922 (the 1897 act), confers on the adopted child and the adoptive parent the right to inherit, each from the other. The first three paragraphs of the syllabus read as follows:

"The statutes of Nebraska relating to the adoption of minor children contemplate two kinds of adoption; one an unrestricted adoption; the other an adoption restricted by the terms and conditions set forth in the petition for and consent to adoption.

"If no terms or conditions are contained in the petition for or consent to the adoption of a minor child, then the adoption is unrestricted, and the rights of the adopted child and adoptive parent are governed by the provisions of section 1572, Comp. St. 1922.

"The right to inherit property of a deceased person is created by statute. The legislature may confer upon adopted children and adoptive parents the right to inherit, each from the other."

In the body of the opinion, relating to the last point of law just quoted, we said:

"The right of inheritance is created by statute. It is within the power of the legislature to determine what persons or whether any person shall inherit from one who dies intestate, and to determine what proportion of the

decedent's estate shall descend to any particular person or class of persons. The legislature creates and may take away the right to inherit. It is within the power of the legislature to confer the right of inheritance upon adopted children or adoptive parents, as well as upon natural children and parents. If there are no restrictions, limitations or conditions in the adoption, our statute of adoption creates the legal relation of parent and child and gives to the adoptive parent and the adopted child all of the rights that pertain to that relation by virtue of the statute of descent." *In re Estate of Enyart,* 116 Neb. 450.

The first item for consideration is whether the rules, as announced with reference to the right of an adopted child to inherit, apply to one who was adopted prior to the present statute but whose adoption proceedings did not contain terms and conditions against inheriting from the adopting parent. We have already shown that there was nothing in the adoption proceedings here involved which provided that the children should have the right of inheritance, nor was there anything preventing the parties interested from supplementing the proceedings at a later date by granting the right of inheritance. The adopted children were given all other rights except the right of inheritance, but they were nevertheless adopted children.

As we have seen from what has been quoted from *In re Estate of Enyart, supra,* the right of inheritance is purely a creature of statute. The legislature may give and the legislature may take it away. It was in the power of the legislature in 1897 to say that the children who had been adopted under the prior act and by that adoption had been given equal rights with natural children should be deprived of the right to inherit, had the legislature been so minded. It did provide more liberally as to inheritance than had theretofore been the rule, because it provided that, unless there was a restriction in the adoption proceedings, the adopted child should inherit; whereas, under the prior law, it was provided that he should

not inherit unless it was expressly provided in the adoption proceedings.

In other jurisdictions the rule contended for by the appellees has been sustained. In *Dodin v. Dodin,* 44 N. Y. Supp. 800, the court held: "Laws 1887, c. 703, which amends Laws 1873, c. 830, so as to confer the right of inheritance on adopted children, applies to children theretofore adopted under the act of 1873." And said, in the body of the opinion: "There can be no question about the legislative power to capacitate an adopted child for inheritance in the future, although such capacity was not derived from the act of adoption." It approved a prior holding in the case that the operation of the act is prospective and not retrospective.

The supreme court of Vermont, in *In re Estate of Hagar,* 98 Vt. 235, held that the right to take property by a devise or descent is not a natural but a statutory right and therefore subject to legislative change at any time before the death of the owner of property; citing many cases.

In *Theobald v. Smith,* 103 App. Div. (N. Y.) 200, it was held that a child, adopted in 1886 under the act denying it the right of inheritance, acquired that right under the Laws of 1887. It held in that case, as was held in the *Dodin* case, that the effect and operation of the act of 1887 is prospective and not retrospective; that it simply adds adopted children to the list of those who shall be capable of inheriting, if at the time the descent is cast they are within that description.

In *Sorenson v. Rasmussen,* 114 Minn. 324, it was held that an amendment, giving to an adopted child the right to inherit, applies to all adopted children, whether adopted prior or subsequent to the passage of such statute; and held that the statute acts prospectively upon rights accruing through the death of adoptive parents after the passage of the law.

The appellant raises the objection to the application of the 1897 law that it is not an amendment of the prior

law but is an act complete in itself. It is true that it does not in terms state that it is an amendment and it is likewise true that the title of the act shows that it is an act to provide for the adoption of minor children and to repeal the specific act previously existing in relation thereto. But it was dealing at large, under the general subject of adoption, with the subsidiary subjects of adopted children, adoptive parents, and the rights of inheritance of each class from the other. All of these subjects inhered in the prior act. A perusal of the two acts in the light of legislative experience or observation, from neither of which are we compelled to divorce ourselves merely because we are judges, will convince the reader of two things: First, that the prior act was in practical effect amended by the present one; and, second, that the mechanics of the work was simplified by calling it an act to provide for adoption and to repeal, rather than an act to amend. The legislature took the simpler but the saner way, less likely to result in complications. They provided in the new law a standard for inheritance as they had provided one in the old. They were dealing with the rights of adopted children to inherit. They were considering a large class of persons whose social value to the state and to society merited that they should be considered tenderly and that none be forgotten. If the act is capable of the interpretation that they intended to grant the same right of inheritance to those adopted prior to 1897, as to those adopted thereafter, where the conditions were equal, we think we should adopt such a view. Looking beyond the form to the fact and through the shadow to the substance, the act of 1897 was in effect an amendment. Moreover, where there is a simultaneous repeal and reenactment of a portion of a former act, it is the prevailing view that the reenactment neutralizes the repeal and those provisions which are thus reenacted continue in force without interruption so that all rights and liabilities that have accrued thereunder are preserved and may be enforced. 25 R. C. L. p. 934, and cases cited. To this rule there is slight dis-

sent in the authorities. It is by virtue of this rule that the legislature by the act of 1897 recognized and continued in force the adoption of the appellees and in the same act exercised the legislative right, heretofore discussed, to grant to appellees the prospective right to inherit from Mrs. Grinnell their distributive shares of her intestate estate of which she might die seised. She and her husband adopted the children knowing, presumptively, that the laws of inheritance might be changed. She is presumed to have known since the passage of the act of 1897 that it had been changed so that the adopted children would inherit through her. Had she desired to avoid the effect of the law, she could have made a will carrying out her wishes instead of dying intestate. From the presumptions arising from the law as well as from internal evidence in the record as to her feeling toward appellees, we infer that she had no desire to interfere with the descent cast upon them by the law of 1897.

We are of the opinion that the act of 1897, providing for the adoption of minor children, of which section 1572, Comp. St. 1922, is a part, preserved the adoption of children theretofore adopted and gave the right to inherit from their adoptive parents to such adopted children as were not precluded from inheritance by the terms and conditions of the proceedings by which they were adopted.

The conclusion to which we have already arrived makes it unnecessary to discuss other questions covered by the briefs and arguments, in able and interesting fashion, by which appellees seek to maintain, and appellant to refute, that, irrespective of the act of 1897, the appellees were entitled to inherit from their adoptive mother.

We are of the opinion that the judgment of the district court was right and it is

AFFIRMED.

FRANK W. MCROBERTS, RECEIVER, ET AL., APPELLEES, V. WILLIAM A. DWORAK ET AL., APPELLANTS.

FILED JULY 2, 1928. No. 25954.

1. **Married Women:** CONTRACTS. The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute.
2. ———: ———: ACTION ON NOTE: BURDEN OF PROOF. Where coverture is pleaded by a married woman as a defense in a suit on a promissory note, which she signed as surety, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her separate property and estate, and with the intent to bind herself for its payment.

APPEAL from the district court for Colfax county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

George W. Wertz, for appellants.

W. I. Allen, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

DEAN, J.

Frank W. McRoberts, as receiver of the First National Bank of Schuyler, hereinafter called the bank, filed a motion in the district court for Colfax county wherein he sought to recover a deficiency judgment against the defendants William A. Dworak and Lucy Dworak, husband and wife, on a cause of action formerly reduced to judgment against the Dworaks. This proceeding is the outgrowth of a promissory note, dated February 1, 1923, executed by the defendants for an obligation of William A. Dworak. The note is in the usual form, except that it closes with these words:

"I or we, each of us, personally hereby charge our own separate and individual estate with the payment of this note. (Signed) William A. Dworak, Lucy Dworak."

August 10, 1926, the motion of plaintiff was sustained and pursuant thereto a deficiency judgment for $10,866.46

was rendered against both the defendants, with accrued interest. And in its decree the court found "that the separate and individual property and estate of the said Lucy Dworak is held, bound and charged with the payment of this judgment, which bears interest at the rate of 10 per cent. per annum from this day." Mrs. Dworak has appealed.

The argument of the receiver now is that Mrs. Dworak is bound by the act of signing the note in suit with her husband, and that she thereby made the debt her debt and has therefore charged her separate property and estate for its payment. So that the sole question before us is whether Mrs. Dworak signed the note with intent to bind her separate property and estate for the payment of the note and thereby became liable for the debt of her husband.

In Mrs. Dworak's answer it is pleaded that the parties to the instrument in suit at the time of its execution talked it over and agreed that in signing the note it should not be intended to bind her separate estate, and that this was the mutual understanding of the parties. The evidence of the bank officials who took the note, as well as the evidence of the defendants, supports the allegations of the answer. Mrs. Dworak's evidence stands undisputed. Under such circumstances, it would be manifestly unjust to hold her liable for a deficiency judgment.

"The common-law disability of a married woman to contract is in force in this state, except as abrogated by statute. * * * When a married woman signs a note there is no presumption that she intended thereby to fasten a liability upon her separate estate, but in an action on such note, where coverture is pleaded as a defense, and proved, the burden is upon the plaintiff to establish that it was made with reference to, and upon the credit of, her property, and with the intent to bind the same." *Grand Island Banking Co. v. Wright,* 53 Neb. 574.

Clearly, it is within the well-recognized rule for Mrs. Dworak to establish by parol testimony that she did not intend to bind her separate estate. And it is undisputed

that she did not intend to do so. It follows that no liability attaches in respect of her property.

From what has been said it follows that the judgment of the district court must be and it hereby is reversed and the cause is remanded, with directions that the plaintiff's cause of action be dismissed as to Lucy Dworak.

REVERSED.

HOWELL, J., concurring.

I concur in the results of the foregoing opinion.

The note contains the clause: "I, or we, each of us, personally hereby charge our own separate and individual estate with the payment of this note." It will be noticed the note does not contain a provision that Lucy Dworak "intends" to bind her separate estate.

It may be reasonably said the provision above quoted is ambiguous to a certain extent. Section 8851, Comp. St. 1922, provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." The situation is sufficient to admit of parol proof as to the understood meaning of the terms of the note, without disobeying the rule against varying written contracts by parol.

LINCOLN SAFE DEPOSIT COMPANY, APPELLEE, V. PERRY A. YEAST, APPELLANT.

FILED JULY 2, 1928. No. 25982.

1. **Pledges: FORECLOSURE.** Where, as in this action, a real estate mortgage of a third party together with the notes secured thereby are pledged by the mortgagee as collateral security for a debt owing by him to the pledgee, and the pledgee thereafter forecloses such mortgage without making the pledgor a party to the suit, and at the foreclosure sale purchases the property and takes title in his own name, he is presumed to hold, as pledgee, such real estate as collateral security for the principal debt in lieu of the mortgage foreclosed, unless it appears that it was the intent of such purchaser to acquire a fee title.

2. Record examined, and judgment found to be supported by the evidence and the law applicable.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellant.

Stewart & Stewart and *Perry & Van Pelt, contra.*

Heard before ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

THOMPSON, J.

This is an action instituted in the district court for Lancaster county by appellee, hereinafter called plaintiff, against the appellant, hereinafter called defendant, seeking to recover judgment on a promissory note, but which by the mutual consent of the parties was afterwards converted into an action in equity. Trial was had to the court and judgment entered in favor of plaintiff, to reverse which the defendant appeals.

A résumé of the pleadings in the case, as we view them, will aid us in our consideration. As above indicated, the original action was one at law to recover $9,896.70 on a promissory note dated January 1, 1924, executed by defendant to plaintiff. The defendant in his answer denied each allegation of the petition, and further pleaded that on March 1, 1922, defendant borrowed from plaintiff $52,642 evidenced by coupon bonds; that to secure the payment of such bonds he assigned to plaintiff a note and mortgage executed by one Ballinger to defendant, in the sum of $52,642, which mortgage covered 10,240 acres of land in Sheridan county; and as further collateral to such loan defendant assigned and transferred to plaintiff two $10,000 promissory notes, given to defendant by Mack Higdon, a resident of Canada; that Ballinger failed to pay the interest installments due on his note, which interest (also interest on all collateral notes) should have been collected by plaintiff and applied on defendant's indebtedness to it;

that the above $9,896.70 note purports to represent the past due and unpaid interest on the notes then held by plaintiff as security, hence was without consideration; that, while Ballinger was in possession of these mortgaged lands, a lease was by him executed to one Lowe, and defendant procured Ballinger to assign to plaintiff $2,500 of such rentals, which when by assignee collected were to be by it applied on the above indebtedness; that plaintiff foreclosed the Ballinger mortgage and the premises were sold and bid in by it, and now the plaintiff is the record owner thereof; that the land is fairly and reasonably worth $10 an acre; that an action has been commenced by plaintiff on the Higdon notes in Canada, in a court possessed of jurisdiction, and that Higdon is solvent; that defendant is entitled to, and demands, an accounting as between the plaintiff and the defendant, as to the various transactions involved; and prays: "That plaintiff's petition be dismissed; that an accounting be had between the plaintiff and defendant covering the various transactions as herein set forth, and that judgment be entered herein based on such accounting, and for such other and further relief as may be just and equitable."

On filing of this answer, by reason and in furtherance of the matters therein contained and prayed for, plaintiff asked and was granted the right to file an amended and supplemental petition in equity, which it did, and therein set forth in detail the entire transactions indicated by such answer, including all expenses connected therewith, among which allegations were, that it bid in and took the title to the Sheridan county lands in its name at the instance and request of defendant, as evidenced by oral contract and written correspondence, to be by it held and by it sold and proceeds, less expenses, applied upon the original loan from plaintiff to defendant; that defendant was interfering with the suit in Canada in a wrongful manner to plaintiff's damage, and should be enjoined; and prayed that an accounting might be had; that the amount due and owing it be ascertained and judgment entered therefor; that it

might be found to hold the Sheridan county land as pledgee and not as actual owner; that some person be authorized and directed to sell and convey the same, either at public or private sale; that the remaining securities in its hands be collected, and that out of the total of all the aforesaid proceeds the reasonable expenses involved, including court costs, be first paid, and the remainder thereof be applied to the payment of the debt as herein found due it; and if a surplus thereafter remained, the same be paid to defendant, and that report of such sale be made to the court.

To this supplemental petition the defendant answered, entering a general denial, and further alleged as in his original answer, and, in addition, that the bid of plaintiff at the Ballinger foreclosure sale was $58,734, and plaintiff is now the legal holder of the lands in question, and that defendant is entitled to credit upon any indebtedness owed by him to plaintiff for the reasonable value of the premises; that such value exceeds the amount claimed to be owed by defendant to plaintiff. Further, it is alleged that the oral request, if any (for the plaintiff to bid in the land at the foreclosure sale), is void and of no effect, for the reason that same is a contract relating to real estate not in writing, and falls within the inhibition of our statute of frauds; that the district court for Lancaster county is without jurisdiction to foreclose a mortgage on, and sell, land situate in Sheridan county, as asked for in plaintiff's supplemental, petition. He then prays that he may go hence and recover his costs.

To this answer the plaintiff in its reply interposed facts which, if proved, would amount to an estoppel on the part of the defendant to deny the force and validity of the oral agreement pleaded by plaintiff, in furtherance of which it claims it bid in, took in its name, and now holds the Sheridan county land. This was followed by a general denial of all matters in the answer, save those specifically admitted in the reply.

Under these pleadings, and the evidence adduced in harmony therewith, the trial court entered the following

judgment, in substance: That plaintiff have and recover from the defendant the sum of $83,090.54, and in the event that defendant does not pay such amount within 30 days plaintiff may sell the Sheridan county land, either at public or private sale, and make report of the amount realized from such sale, and that such proceeds, less expenses of sale, be credited upon the above sum found due plaintiff; further, that plaintiff proceed with the collection of the Higdon notes, and whatever amount is realized from such collection, less expenses, be also credited on the amount due plaintiff, and if any surplus remain thereafter, plaintiff should pay the same to defendant.

It is claimed on the part of the defendant that certain of the findings of fact by the trial court and certain conclusions of law which formed the basis of the judgment appealed from are erroneous. It is sufficient to say that we have given consideration to each, and conclude that as to the court's findings of fact each thereof is amply sustained by the evidence; that as to the right of the trial court to hear and determine the matters involved herein as a suit in equity and after so hearing to grant full and complete relief, the defendant should not be heard to object, as he it was who initiated the change from that which was purely a law action to one purely equitable, and in so doing selected the forum and invited the procedure, and in good conscience he should not be heard to complain. Then, as the $9,896.70 note which formed the basis of the action as originally instituted was one covered by the pledge set forth in defendant's first answer, the suit in equity was germane to the action as first lodged.

Defendant urges that a Lancaster county district court is without jurisdiction to foreclose a mortgage on, and sell, Sheridan county land. The heretofore indicated record does not show this to be such an action. Therefore section 8555, Comp. St. 1922, and other sections thereof cited, are not controlling. This defendant demanded an accounting, a bringing into the court of all things pertinent thereto on the part of the plaintiff as well as on the

part of the defendant, for its consideration. This required a finding by the court as to the status of the parties in regard to the matters involved, including the lands in question and the respective claimed debits and credits, and also called for the court's direction in reference thereto. As we find, this arduous task was performed by the trial court without error, and clearly pertained to matters within its jurisdiction.

The defendant did not at any time notify the plaintiff that he had elected to treat the purchase of the lands at foreclosure sale by plaintiff as its purchase, and that he demanded credit to the amount of the bid on his indebtedness. In his first answer he says, in substance, that such sale of the property was had, the land bid in by plaintiff, and that the record title stands in its name; that the value of the lands reasonably exceed $100,000, and that such value should be accounted for by plaintiff to defendant; not that defendant demanded credit for the amount of the bid, but that the court should by reason of its far-reaching equitable powers treat these lands as of the date of trial as lands of defendant wrongfully held by plaintiff, and by decree award defendant the value thereof. Thus, at the time of trial defendant had not elected to hold plaintiff for the amount of the bid. Further, it will be noticed that in defendant's second answer the substance of his original answer was contained therein, and, in addition, that the bid of plaintiff at the foreclosure sale was $58,734, and plaintiff is now the legal holder of said premises, and that defendant is entitled to credit upon any indebtedness owing by him to plaintiff for the reasonable value of said premises, not for the purchase price at the sale. Defendant at no time asks that he be given credit for the amount of the bid.

Under the record, we are of the opinion that in denying credit to defendant of the amount of such bid, and in directing plaintiff to sell the lands, the trial court is supported by the evidence and the law applicable. The plaintiff became the purchaser of this land, not with the intent

or purpose of becoming the owner in fee thereof, but with the intent of changing the character of the pledge from a pledge of the mortgage being foreclosed and the notes secured thereby to a pledge of the lands covered by such mortgage, and so took and held, and now holds the same; and in so doing it was and is acting within its legal rights in furtherance of its duties as such pledgee.

The law applicable to the case before us is: Where a real estate mortgage of a third party together with the notes secured thereby are pledged by the mortgagee as collateral security for a debt owing by him to the pledgee, and the pledgee thereafter forecloses such mortgage without making the pledgor a party to the suit, and at the foreclosure sale purchases the property and takes title in his own name, he is presumed to hold, as pledgee, such real estate as collateral security for the principal debt in lieu of the mortgage foreclosed, unless it appears that it was the intent of such purchaser to acquire a fee title.

This conclusion is not in conflict with our holding in *Ross v. Barker*, 58 Neb. 402, wherein it was found by the the court that the pledgee bought the lands at the foreclosure sale with intent to acquire complete title thereto.

All claimed errors presented have had our consideration, some specifically and others in a more general way, and we conclude that the judgment of the trial court is right, and it is

AFFIRMED.

CHARLES E. ABBOTT V. STATE OF NEBRASKA.

FILED JULY 2, 1928. No. 25809.

1. **Bail: SUFFICIENCY OF BOND.** Where a defendant in a criminal case gave an appeal bond conditioned for his appearance on the first day of the next term of the district court instead of forthwith, but the first day of the next term was the first day upon which the district court sat, and was the first opportunity given defendant for such appearance, and he did appear upon said date without objection being made thereto until after seven

terms of court had intervened, *held*, upon objection made to jurisdiction of district court on the ground of invalidity of the bond, that said bond was a substantial compliance with the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923.

2. ———: BOND FOR APPEARANCE: "FORTHWITH." The word "forthwith," as used in the statute relating to the appearance of a defendant in a criminal case in the district court, means the first opportunity offered defendant, after appeal is perfected, to appear when said court is in session.

3. Statutes: CHANGE OF PROCEDURE: APPEARANCE. The changing of the time for appearance, in the appeal of a defendant in a criminal case, from the first day of the term to forthwith, is merely a change of procedure, and as such the appeal is governed by the provisions of the law applicable thereto at the time when the judgment of the lower court was rendered.

4. Criminal Law: APPEAL: DISCHARGE. Where a person is convicted of any offense and has appealed and given bond for his appearance, and if, without his application for a continuance or want of time to try such cause, he is not brought to trial before the end of the third term of the court in which the cause is pending, he is, on motion, entitled to be discharged, as far as relates to such offense.

ERROR to the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Reversed, with directions.*

King & Bracken and *Perry & Van Pelt*, for plaintiff in error.

O. S. Spillman, Attorney General, and *J. L. McPheeley, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and HOWELL, JJ., and BEGLEY, District Judge.

BEGLEY, District Judge.

On July 1, 1924, Charles E. Abbott was tried, convicted and fined on a charge of assault and battery, alleged to have been committed in Kearney county, May 19, 1923. He immediately executed an appeal bond with sufficient sureties, conditioned that he would "personally appear be-

fore the district court in and for said Kearney county * * * on the first day of the next jury term thereof and from time to time and from term to term as may be ordered by the said court until the final determination of the aforesaid cause, * * * and not depart the court without leave." The first day of the next term of court, and the first day upon which the court held a session after said appeal was October 14, 1924. Presumably the defendant appeared on said date and thereafter, from time to time and from term to to term, as required by the terms of his bond, until seven terms had intervened. At the April, 1926, term he filed a motion for his discharge, based on section 10046, Comp. St. 1922, relating to the discharge of an accused not brought to trial before the end of the third term of the court in which the case is pending. Upon objection by the county attorney to an immediate hearing on the motion, same was continued, and on April 20, 1926, the county attorney moved to dismiss the appeal because the appeal bond was void, in that it did not conform to the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923.

In 1922 the law required the giving of a bond conditioned for the appearance of the defendant on the first day of the next term, but in 1923, after the alleged commission of the assault and battery by the defendant, the law was amended, providing that the bond be conditioned for appearance forthwith, and without further notice, in the district court for such county, and from day to day thereafter until the final disposition of said appeal, to answer the complaint against him, and to abide the judgment of the district court, and not depart therefrom without leave. The trial court, on a hearing, sustained the motion of the county attorney to dismiss the appeal, and overruled the motion of the defendant to be discharged from further prosecution in the case. There was no timely objection to the jurisdiction of the court over the person of the defendant in the pending action against him. On the other hand, the state treated the case as one pending. In the prosecution of a

sodomy case pending against the defendant at the same time, the defendant filed a plea in bar, alleging that said crime charged was based on the same facts, circumstances and transactions as the assault and battery charge. The state in that case filed an answer in which it alleged that in said assault and battery case the defendant had given bond, caused transcript to be filed, an that said cause was now pending in the district court for Kearney county on said appeal.

This court held in the case of *Killian v. State,* 114 Neb. 4, that, where an objection was timely made, an appeal bond which failed to require the defendant to appear forthwith before the district court, but instead directed him to appear on the first day of the term, was not a substantial compliance with the statute and failed to confer jurisdiction on the appellate court. It is contended by plaintiff in error that the bond in this case, as shown by the circumstances, is a substantial compliance with the terms of the statute. The true purpose of the recognizance is the protection of the public. *Whetstone v. State,* 109 Neb. 655. It is not absolutely necessary that the word "forthwith" be used in the bond, if under the wording used the defendant is compelled and required to appear at the same time as though the word had been so used. The word "forthwith" is defined as follows in 2 Bouvier, Law Dictionary (3d Revision) 1289: "As soon as by reasonable exertion, confined to the object, it may be accomplished." Here the first day that the trial court was in session, and the first day that the defendant could appear forthwith, was October 14, 1924, being the first day of the next term, and the day on which he did appear. Consequently the day named in his bond was the same as "forthwith" as far as facts in this case appear.

In *Holmes v. State,* 17 Neb. 73, where the recognizance required the defendant to appear before the district court on a certain day named, instead of the first day of the next term, but which day named was in fact the first day of the next term, this court held the recognizance sufficient to

confer jurisdiction on the district court, holding: "While the law requires the defendant to be required to appear and answer to the charge on the first day of the next ensuing term, yet we know of no law requiring the exact language of the statute to be followed in a recognizance. If he is required to appear upon a day which in fact is the first day of the term it is sufficient."

In view of the constitutional guaranty of the right of appeal in criminal cases, where the date in the recognizance on which defendant is required to appear before the district court is the first opportunity given defendant for such appearance, the state is not substantially prejudiced, trial on appeal is not delayed, and same is a substantial compliance with the statute.

The state in this case asserted a position in the sodomy case that a valid appeal was pending in this case and accepted the benefit of the appeal as though the recognizance had been within the statute, in order to sustain the bringing of the other action, and it thus seems to have placed the same construction on the bond as we have determined above.

Defendant contends that, as the crime was committed before the amendment of the statute, requiring his appearance forthwith before the district court, said amendment is *ex post facto* and does not apply to this case, and he has the right of appeal under the previous provision. This is not an amendment changing the punishment for the crime charged, nor does it alter the situation of the defendant to his disadvantage. It is merely a change of procedure in the right of appeal, and as such the appeal is governed by the provisions of the law applicable thereto at the time when the judgment was rendered. *Marion v. State*, 16 Neb. 349; 17 C. J. 25, sec. 3283.

For the foregoing reasons, the trial court erred in dismissing the appeal and overruling the motion of defendant for discharge. The judgment is therefore reversed and the cause remanded, with direction to the trial court to overrule the motion of the state for dismissal as to lack of

jurisdiction, and to sustain the motion of the defendant for a discharge from this case on the ground that more than three terms of court have intervened since the filing of the appeal.

REVERSED

J. P. THORNTON, APPELLEE, V. FARMERS & MERCHANTS NATIONAL BANK, OF FAIRBURY, ET AL., APPELLEES: H. L. CLARK, APPELLANT.

FILED JULY 2, 1928. No. 26112.

Mortgages: FORECLOSURE: DEFICIENCY. Where a person is the holder of a negotiable promissory note secured by a mortgage made to him personally, and thereafter sells and assigns same, for value, in his own name, without disclosing on the instrument that he is acting as agent or in a fiduciary capacity, such person, when sued by the purchaser for a deficiency judgment in foreclosure proceedings based on said mortgage, is liable for such deficiency.

APPEAL from the district court for Jefferson county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Hartigan & Fouts, for appellant.

Heasty, Barnes & Rain, Denny & Denny and *E. A. Wunder, contra.*

Heard before ROSE, GOOD, THOMPSON and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BEGLEY, District Judge.

This is an action of foreclosure wherein, after mortgaged property had been sold, application was made for a deficiency judgment against the maker and indorsers of the note. The evidence discloses that previous to July 19, 1922, the Farmers & Merchants National Bank of Fairbury, Nebraska, held some unsecured obligations of the then owner of the land in question, and in order to satisfy

same it caused a sale to be made from said owner to one George C. Light, for a consideration of $12,000. Light received a deed to the premises and raised the purchase price by giving a $6,000 mortgage to a loan company, a $3,000 mortgage to H. L. Clark, being the note and mortgage in controversy here, and executed a $3,000 note to the bank for the remainder. Before maturity of the note and mortgage Clark, being the president of the bank at the time, through the activities of the bank officials, sold and assigned the note and mortgage to Thornton, the plaintiff, for the sum of $3,000, which was paid to the bank and applied upon the indebtedness of one Dawson who was the former owner of the land in question. Thornton, however, did not purchase the note until it was first indorsed with the signatures of H. E. Fairchild, A. L. Newell, and A. R. Nichols, all these parties being officers or stockholders of the bank. The note was not paid when due and plaintiff brought foreclosure and, the sale having resulted in a deficiency, this action was maintained to recover the balance from Clark and the other indorsers. Before the bringing of the foreclosure suit, the Farmers & Merchants National Bank of Fairbury was placed in the hands of a receiver, and the receiver thereafter took a deed to said property from Light in settlement of certain indebtedness Light owed the bank, and the bank was the owner of said land at the time of bringing the foreclosure and was made a party defendant as such.

The defendant H. L. Clark filed an answer and cross-petition in which he set up that the Farmers & Merchants National Bank was actually the owner of said $3,000 note and mortgage at the time of its assignment by him; that he was at said time president of said bank and merely took the note in his name as such officer and as agent; that he had no interest therein, all of which was known to the plaintiff and the bank through its officers, and asked that any deficiency be decreed against the bank and he be relieved therefrom. The receiver of the bank answered denying that it had any interest in said note and mortgage

except as owner of the land acquired after the note and mortgage were given.

The court found against the contention of Clark and decreed a deficiency judgment against him and the other indorsers on the note, and relieved the bank and all other parties from liability for the deficiency, from which decree defendant H. L. Clark has appealed.

The plaintiff Thornton bought the note and mortgage for full value, relying upon the signers of the note. In fact, the names of the indorsers were placed thereon at his request, to give him better security, and he did not rely on any title in the bank. Light testified that he was the owner of the land at said time by purchase, and Nichols, the bank cashier, testified that the bank had no interest in the land at the time the note and mortgage were given, but by this method they held a lien for part of the purchase price from Light, and by the sale and transfer they were able to apply the money in cleaning up some obligations of Dawson, which were unsecured while he was the owner of the land. There was no obligation or other evidence of debt securing this note and mortgage given by the bank that would render it liable for the deficiency as provided by statute. Comp. St. 1922, sec. 9211.

Where a person signs a negotiable instrument in his own name, without disclosing on the face of the instrument that he is acting as agent, or in a fiduciary capacity, and also the name of his principal, such person, when sued for a deficiency judgment in foreclosure proceedings, is liable for deficiency judgment. *Farrell v. Reed,* 46 Neb. 258; *Reeves v. Wilcox,* 35 Neb. 779.

The district court was therefore right in not decreeing a deficiency judgment against the Farmers & Merchants National Bank, and the decree is

AFFIRMED.

STATE, EX REL., O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF POTTER: OMAHA NATIONAL BANK, CLAIMANT, APPELLANT: VAN E. PETERSON, RECEIVER, APPELLEE.

FILED JULY 2, 1928. No. 25056.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS. A certificate of deposit which represents money obtained by a stockholder of a failed bank for the purpose of effecting a loan to said bank will not be allowed as a claim against the depositors' guaranty fund.
2. ———: ———: ———. Funds collected by a bank for a customer and deposited to his credit with his consent form a legal basis for the issuance of a certificate of deposit, and will be allowed against the depositors' guaranty fund, notwithstanding the fact that such customer was an officer and director of the bank; it not appearing that a loan to the bank was intended.
3. ———: ———: ———. A certificate of deposit within the protection of the depositors' guaranty fund, issued to an officer of the bank and in the hands of a third party as collateral security, was renewed in the following manner: The holder sent the certificate when due to the bank, and the officer sent his check on the holder for the face value thereof to the issuing bank, which thereupon remitted the amount by draft to the holder who collected it and paid the proceeds to the officer; the bank renewed the certificate and sent it to the officer who deposited it with the holder as security in lieu of the renewed certificate. *Held*, that the transaction did not effect a loan to the bank, and that the renewal was a deposit within the protection of the fund.
4. ———: INSOLVENCY: TRUST FUNDS. Where one bank sends to another, for collection and remittance, notes of third parties, the latter bank holds the same and their proceeds as trustee for the former, which, upon failure of the collecting bank, is entitled to a prior lien therefor upon the assets of the failed bank to the extent that they have been augmented by the trust funds, provided such augmented assets are traced into the possession of the receiver, and into some existing asset of such bank.
5. **Trusts**: INSOLVENT BANK: TRACING FUNDS. Where the trust fund consisted of money, and upon failure of the trustee no money was found in his assets, it sufficiently appears, *prima*

facie, that the trust fund had been dissipated, and unless the *cestui que trust* is able to trace such funds into some particular existing asset, or to some mass of such assets, particular or general, the trust fails for want of a subject.

6. Banks and Banking: DEPOSITOR. The relation of banker and depositor can only be created by contract express or implied.

7. ———: GUARANTY FUND: TRUST FUNDS. Trust funds in the hands of a bank will not be changed into a deposit by implication, by reason of the conversion thereof by the trustee, and thus be made a charge upon the depositors' guaranty fund.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part.*

Smith, Schall, Howell & Sheehan, Warren H. Howard and *Gaines, Van Orsdell & Gaines*, for appellant, Omaha National Bank.

O. S. Spillman, Attorney General, C. M. Skiles and *Roland V. Rodman, contra.*

Heard before GOSS, C. J. ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an appeal growing out of the failure of the Citizens State Bank of Potter, Nebraska, a receiver for which was appointed February 13, 1924, the Omaha National Bank presenting claims against the depositors' guaranty fund, arising out of three certificates of deposit stated as three separate causes of action. The district court allowed the claims on the first two causes of action as charges against the general assets of the bank, but disallowed them as claims against the guaranty fund, and the bank appeals. The district court allowed the claim of the bank on the third cause of action against the general assets and also against the guaranty fund, and the receiver appeals. The facts (many of which are stipulated and none in serious dispute) of each transaction will be stated

and considered as the first, second and third cause of action, respectively.

First cause of action. November 5, 1923, certificate of deposit No. 1823 was issued by the bank to George A. Roberts in due form, bearing interest at the rate of 5 per cent. for the sum of $3,600. This certificate was the final renewal of No. 1171 issued to Roberts November 15, 1921, for the same amount, and which was based upon the following transactions:

(a) October 25, 1921, the Potter bank was overdrawn at the Merchants National Bank in the sum of $2,050.27, and that bank called Roberts, who was president of the Potter bank and living in the city of Omaha, and Roberts thereupon sent his check for that amount to the Merchants Bank in order that the checks of the Potter bank held by them would not be protested.

(b) At the time No. 1171 was issued the Potter bank was owing Roberts for interest items collected by it upon notes and mortgages belonging to Roberts in their hands the sum of $974.08, for which they had issued to Roberts a deposit slip.

(c) Sometime prior to the issuance of No. 1171 Roberts had paid to the Omaha National Bank for account of the Potter bank the sum of $5,000, all of which had been repaid except the sum of $575.65.

These three items total $3,600, the amount of said certificate.

As to transactions (a) and (c), the letters of Roberts to the Potter bank do not sustain the claim that they were deposits. The following excerpts from the letters clearly stamp the transactions as loans:

October 25, 1921.

"The Merchants National Bank just called me up and said that your bank was overdrawn down there tonight, $2,050.27, and in order to fix the matter so that they would not let the checks go to protest, I am sending them down a check for the above amount. I certainly hope that in some way the bank can get itself in shape so these fellows

don't keep calling me up all the time and asking me to take care of obligations, as above.

"The Citizens State Bank at Potter, confidentially, is getting a bad name here in Omaha on account of these overdrafts and drafts that is made on the bank, and laying around for a week without being paid.

"As you know I am mighty hard up myself and I would like to be one of the first to be reimbursed on this $2,050.27."

November 3, 1921.

"You are well aware of the load I am carrying for the two banks, and I cannot afford to have these Omaha banks continually writing and calling me up in regard to the way the banks at Potter and Dix are being handled. They must be handled in a business-like way if they are going to be handled at all. * * * Just a few days ago I sent down to the Merchant National Bank $2,050.27. Just last night Mr. Eastman called me up and said there was another overdraft. Now, I am all through sending down checks to these banks, * * * and we might as well have an understanding first as last, as to where we stand."

November 8, 1921.

"Also at one time when I paid the Merchants National Bank $5,000 there was to have been notes sent me covering this payment, but there was a shortage on this account of $575, and after deducting $200 difference on your notes yesterday, still leaves $375 in paper due us. Also on October 25th, I gave the Merchants National Bank a check for $2,050.27 to take up an overdraft that they were kicking about.

"Now I think the way to square this thing up if you haven't got the money is to give me a certificate of deposit for the following amounts: $2,050.27 with interest at 8% up to October 25 until you make out the certificate; $1,174.08 plus debit memorandum, $7.81, which is due me on interest paid and deposited in the bank; and for $375 balance due me on deficit to cover $5,000 which I paid the

Omaha National Bank. This would make a total certificate of deposit of a little over $3,600."

With reference to (a) and (c) claimant argues that the Potter bank received full consideration for this certificate; but the question is whether they were loans or deposits. It cannot be said that they were deposits in the ordinary course of the banking business. At the time the payments were made neither party considered them deposits, and the letters above quoted show beyond dispute that the bank was in financial difficulty and the money was paid by Roberts to aid the bank, he protesting the while. The money was not a voluntary deposit in the bank for the benefit of Roberts, but was apparently forced from him by reason of his interest in the bank as a stockholder and officer. By paying a debt of the bank and taking a certificate of deposit for the amount, a stockholder may not change the debt into a deposit and thus charge the guaranty fund; if so, ordinary debts would be placed upon the same plane as deposits. True, had Roberts in good faith deposited money in the bank and the latter had paid its debt with it, that result might apparently have been accomplished; but if it appeared that such was the purpose of the transaction, it would be considered a loan. Section 8033, Comp. St. 1922, provides:

"No claim to priority shall be allowed which is based upon any evidence of indebtedness in the hands of or originally issued to any stockholder, officer, or employee of such bank, which represents money obtained by such stockholder, officer, or employee from himself or some other person, firm, corporation, or bank in lieu of or for the purpose of effecting a loan of funds to such failed bank."

We think it clearly appears that the purpose of these payments was to assist the bank, and in fact they were loans by an officer and stockholder.

As to transaction (b) the certificate represented money in the bank which had been collected for Roberts on other transactions, was placed to his credit, and instead of drawing it out he accepted a time certificate. This merely

changed the form of the deposit. The facts fulfil all the requisites of a deposit and the amount is payable from the guaranty fund.

Second cause of action. This is based upon certificate No. 1763 issued August 15, 1923, for $3,500, to George A. Roberts, and is the last renewal of No. 1230, dated January 13, 1922, for the same amount, the history of which is as follows: On January 5, 1921, A. R. Roberts, brother of George A., sold to the Potter bank two notes aggregating the full value of $7,000 and received certificate No. 882 for the sum of $7,000. Subsequently this certificate was renewed for the same amount, and later, January 13, 1922, was split into two certificates, Nos. 1229 and 1230, each for $3,500. These were subsequently renewed, one of them by certificate No. 1418, and the other one not being in controversy herein. No. 1418, prior to its maturity, October 13, 1922, was purchased for full value by George A. Roberts and delivered to the Omaha National Bank as collateral security to George's debt to said bank in the sum of about $20,000. When No. 1418 became due the Omaha National Bank sent it to the Potter bank. About the same date George A. Roberts sent to the Potter bank his check on the Omaha bank for $3,500, payable to the Potter bank, and on the same day, October 11, 1922, the Potter bank issued its draft payable to the Omaha National for the full amount of said certificate and interest. On the same date certificate of deposit No. 1487 was issued by the Potter bank to Roberts for $3,500, due January 15, 1923, drawing 5 per cent. interest, which being received by Roberts, he turned the same over to the Omaha National Bank as collateral security in lieu of the previous certificate, No. 1418, and upon the return of the draft, above referred to, the Omaha National Bank turned the money over to Roberts. Certificate No. 1487 was renewed by No. 1585, and that by No. 1763, the same procedure being followed as with No. 1487, No. 1763 being the one upon which claim is made. Upon this state of facts it must be conceded that the original certificate, No. 882, to A. R. Roberts

for $7,000 represented a deposit within the protection of the guaranty fund (*State v. Farmers State Bank*, 113 Neb. 82); that the renewals thereof down to and including 1418 also represented deposits. It is stipulated that prior to October 11, 1922, "A. R. Roberts sold for the full value, plus interest, for cash, to George A. Roberts, certificate No. 1418," and that George delivered the same to Omaha National Bank as security for his debt. Up to this point, then, No. 1418 was within the protection of the act, and if the Potter bank had failed while the Omaha bank held No. 1418, no question could be made as to the priority of its claim.

The receiver contends that the process by which 1418 was renewed by 1487 converted the deposit into a loan; that when Roberts gave his check upon the Omaha bank to enable (let it be assumed) the Potter bank to take up 1418, he thereby made a loan to the Potter bank, for which claimant is now seeking priority. We can not adopt this view. While the procedure was unusual, it must be remembered that the $3,500 represented by Robert's check simply went around in a circle returning to him; it is not this $3,500 which is the basis of 1418, but one-half the $7,000 covered by 882. No. 1487 was in effect a renewal of 1418; as the cashier of the Potter bank testified, "One took the place of the other." Suppose Roberts had taken the cash to the Potter bank and laid it on the counter with 1418, requesting a renewal, and upon receipt of 1487 had taken the money and departed, had he made a loan to the bank? Whatever may have been the purpose of the circuitous method adopted, it did not result in a loan. The result is the same as if the bank had sent the renewal direct to the holder without the intervention of the check and draft. The transaction simply amounted to a renewal; the situation of the parties was not changed, the debt remained the same except as to maturity; the liability of the guaranty fund was not increased. We think the claim is properly chargeable to the fund, and the district court erred in not so holding.

Third cause of action. The Omaha National Bank, prior to October 25, 1923, had loaned certain sums of money to the Potter bank and had taken certain securities as collateral, which included three notes, namely, Emil Cords $2,000, due May 27, 1923, C. F. Prehm $1,400, due November 17, 1923, and George A. Colter $650, due November 6, 1923, total $4,050. These notes were sent to the Potter bank for collection and were collected, but remittance therefor was never made to the Omaha National, the proceeds being placed with the other cash of the bank. It appears that, at the time the guaranty fund commission took charge of the Potter bank, the same had an overdraft of $2,185, but that the general assets of the bank which came into the hands of the receiver were in excess of $50,000. It is stipulated that the assets of the bank were increased by the amount of these collections. There is no attempt to trace these funds into any specific property or specific fund other than the general assets before the closing of the bank; nor is there any direct evidence that the trust property was included in those assets which came into the hands of the receiver.

The sole question then is: Where trust funds have contributed to the general assets of a failed bank in such manner that such assets have been augmented thereby to the extent of such funds, will the latter be declared a prior lien upon the assets of such failed bank in the hands of a receiver subsequently appointed, without a showing that the trust funds or their product were a part of a such last-named assets? The history and development of the principles governing the priority of lien of trust funds in the distribution of insolvent estates has been so fully discussed in a number of cases by this court that we will not enter upon a restatement of them at this time, but refer the student to *City of Lincoln v. Morrison*, 64 Neb. 822, and the very recent case of *Central Nat. Bank v. First Nat. Bank*, 115 Neb. 444, concurring opinion of Eberly, J., 115 Neb. 457, also dissenting opinion of Rose, J., 115 Neb. 451, and opinion on rehearing 115 Neb. 472, and dissenting opinion

115 Neb. 478. The facts in this last case were as follows: The insolvent bank received from plaintiff bank for collection and remittance two notes, the makers of which were depositors of the insolvent bank with sufficient funds respectively to pay the notes in question. The insolvent bank charged their accounts with the amounts due upon the notes and, instead of remitting to plaintiff bank, without consent or knowledge of the latter, credited the amount so charged to its account. The cash which came into the hands of the receiver was insufficient to pay plaintiff's claim and was paid out on other preferred claims, but the general assets of the insolvent bank were sufficient to pay plaintiff's claim and about 40 per cent. of all claims. The questions upon which the court divided were (1) whether or not the general assets of the insolvent bank had been augmented by the transaction above detailed, one division taking the view that the reduction of liabilities, by charging the depositor's accounts, automatically produced a corresponding increase of assets, and the other maintaining that the actual assets for distribution to creditors remained stationary; and (2) whether it was necessary to trace the trust fund into some specific fund or property, or whether it was sufficient to trace it into the general mass of assets. In the instant case the stipulation of the parties and the facts themselves show that the estate of the insolvent was augmented by the trust property at the time the collection was made, and that the assets taken over by the receiver were in excess of $50,000. It should, however, be noted that it is not stipulated that the assets taken over by the receiver were increased by the amount of the trust fund, or any other amount; and the evidence fails to show that to be the fact. The most the evidence shows is that the fund went into the general assets of the bank, was commingled therewith and used in the conduct of the banking business, in the course of which all the cash was dissipated and an overdraft existed of $2,185. The bank was closed December 15, 1923, and the evidence does not disclose that the particular assets of the bank at the time these collections were

made were the same as those taken by the banking department or the receiver. The fact seems to be that they were changing from day to day while the bank remained open.

It has been held that, where the trust consists of money which has been commingled with the money of the trustee so that it cannot be identified, the trust fund is a charge upon the mass so long as it remains, and may be followed and claimed. *City of Lincoln v. Morrison,* 64 Neb. 822. But if the whole of such fund or a greater portion thereof than that representing the trustee's own money is used by an insolvent trustee in paying his debts, *cestui que trust* is not entitled to a preference over general creditors for the amount of his money so lost. In that case a portion of the trust money was traced into certain warrants which came into the hands of the receiver, and a preference was allowed as to the proceeds and profits upon their sale, to the extent that the trust fund had been used in their purchase, but denied as to the other assets.

A similar result was reached in *State v. Bank of Commerce,* 54 Neb. 725, where priority was declared as to the cash but not the general assets.

The claimant cites *Capital Nat. Bank v. Coldwater Nat. Bank,* 49 Neb. 786; *State v. Midland State Bank,* 52 Neb. 1, and *State v. State Bank of Wahoo,* 42 Neb. 896, as sustaining the view that priority may be declared upon the general assets of the trustee when it is shown that they have been augmented by the trust funds. In the *Capital National Bank* case, however, the cash taken over by the receiver exceeded the trust fund, and the presumption was that the latter was included in the cash. The same condition existed in the *Midland State Bank* case as shown by the record (*State v. State Bank of Commerce,* 54 Neb. 725, at page 732) though not by the opinion. These two cases go no further than to declare a preference upon a particular fund in the hands of the receiver, to which the trust funds were traced. *State v. State Bank of Wahoo,* 42 Neb. 896, is authority for claimant, but with reference to this case Ragan, C., who wrote the opinion,

and who also wrote the opinion in *State v. Bank of Commerce, supra,* has this to say on page 732:

"The opinion does not disclose whether the cash in the vaults at the time of its failure was equal to or exceeded the amount of the trust fund; * * * but it was never the writer's intention to hold that the beneficiary of a trust fund, simply because of the character of that fund, was entitled to a preference out of the estate of the insolvent trustee, and the case is not to be regarded as an authority for that doctrine."

The three cases just referred to were disapproved in *City of Lincoln v. Morrison,* 64 Neb. 822, *supra,* the court saying (page 825): "We think it expedient to state plainly that this court no longer adheres to the extreme view as to the right of *cestui que trust* to be preferred on insolvency of the trustee, expressed in the cases of (naming them), but adheres to the position taken in *State v. Bank of Commerce,* 54 Neb. 725, and *Morrison v. Lincoln Savings Bank & Safe Deposit Co.,* 57 Neb. 225." This last case involved the conversion by trustee of some warrants, but the evidence failed to show "that anything of value derived from the conversion of the warrants ever went into, or formed part of, the assets of the bank, and thus, directly or indirectly, increased the fund in the hands of the receiver for distribution."

It seems clear from a study of the decisions in this state subsequent to *State v. Midland State Bank,* 52 Neb. 1, that, before priority could be declared against the general assets of the trustee, it must be shown that assets of the particular character of the trust property, *e. g.* cash, are included in the general assets, or that specific property therein had been purchased with the trust funds, and priority was restricted to the cash or property so identified. This is in accord with the weight of the recent decisions.

To summarize the facts of this case relating to this particular question: The Potter bank collected the notes in question in cash and mingled it with the general assets; the bank continued transacting business until December

15, 1923, when it was taken over by the state banking department; at that time its cash was overdrawn $2,185; February 13, 1924, a receiver was appointed; no cash was turned over to the receiver, but other assets in excess of $50,000 came to his hands; none of such assets are shown to have been produced by the trust funds; the trust fund, as cash, had been dissipated before the bank closed; the assets in hands of receiver are no greater than they would have been had the Potter bank paid claimant the amount collected on the notes.

If this is the true position, the claim in question is not entitled to priority, under *State v. Bank of Commerce, supra, City of Lincoln v. Morrison, supra,* and *Morrison v. Lincoln Savings Bank & Safe Deposit Co., supra.* The notes were collected in cash, the bank continued in business until taken over, and no cash came into the receiver's hands, and the cash is not traced into any other property. No other conclusion is logically possible than that the trust fund has been dissipated.

Claimant offered in evidence two letters from the guaranty fund commission as admissions that it had a preferred claim against the fund. These were properly excluded by the district court. Claims against the fund cannot be established by admissions of officers in charge thereof, but only by bringing them within the conditions of the statute.

We have not overlooked the fact that the answer of the receiver is a general denial that any sum is due from the guaranty fund, which latter is a mere conclusion, but we are not thereby precluded from declaring the law applicable to the facts of record, evidence of which was received without objection and by stipulation of the parties.

The district court allowed the claim under the third cause of action as a preferred claim payable from the guaranty fund, upon the theory that it was a deposit. This was error. The relation of banker and depositor can only be created by contract, express or implied. The Omaha National Bank never consented that the proceeds of

the note be deposited in the Potter bank, and it does not appear that they were ever so treated by the latter.

We conclude from the above: (1) That the judgment of the district court disallowing the claim under the first cause of action as a charge against the depositors' guaranty fund be reversed and cause remanded, with instructions to allow the same in the sum of $974.08, with interest at 5 per cent. from November 5, 1923, to February 13, 1924; (2) that said judgment as to the second cause of action be reversed in so far as it denies priority to said claim and cause remanded, with instructions to allow the same against the depositors' guaranty fund in the sum of $3,500 with interest at 5 per cent. from August 13, 1923, to February 13, 1924; (3) that said judgment be reversed as to the third cause of action in so far as it allows said claim as a charge against the depositors' guaranty fund; (4) in all other respects said judgment is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

GOSS, C. J., and DEAN, J., dissent as to the third cause of action.

ROSE, J., dissents.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FIRST STATE BANK OF RICHFIELD: R. O. BROWNELL, RECEIVER, APPELLEE: SAMUEL A. SNIDER, INTERVENER, APPELLANT.

FILED JULY 2, 1928. No. 26076.

1. **Banks and Banking**: GUARANTY FUND: DRAFTS. A bank draft drawn upon another bank in which the drawer has sufficient funds to cover may be the equivalent of money sufficient to bring the draft of the payee bank issued in reliance thereon within the protection of the depositors' guaranty fund.

2. ———: ———: LIABILITY. In determining the question whether the depositors' guaranty fund is chargeable with the amount of an alleged deposit or bill of exchange, the transaction will be considered as it appeared to the parties at the

time, and not as subsequent events may have changed the situation.

3. ———: ———: ———. The mere fact that a transaction resulted in a loss to the bank will not relieve the depositors' guaranty fund from payment of a deposit or bill of exchange which was under its protection at the time the transaction was entered into.

4. ———: ———: ———. The fact that the president of one bank, in drawing its draft, intended to defraud the bank will not deprive the holder of a draft issued by the payee of the fraudulent draft in reliance thereon, and without notice of the fraud, of the protection of the depositors' guaranty fund, the holder being also without notice of the fraud.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

William Baird & Sons, for appellant.

Crossman, Munger & Barton, contra.

Heard before ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is a proceeding by the claimant, Samuel A. Snider, seeking the allowance against and payment from the depositors' guaranty fund of his claim as a holder of exchange issued by the First State Bank of Richfield, an insolvent. The Richfield bank was taken over by the department of trade and commerce September 1, 1926, and a receiver therefor appointed September 30 following. Intervener filed the claim in usual course, and same was allowed as a general claim against the bank, but refused payment from the guaranty fund by the district court, and claimant appeals.

The objections of the receiver to the allowance of the claim against the guaranty fund may be summarized as follows: That the Richfield bank received neither money nor its equivalent, nor was any fund or thing of value placed on deposit in, or at the command of, said bank in

consideration for the bill of exchange in question; that the intervener and the First National Bank of Osceola, through which he claims, negligently paid a certain check for $4,750, referred to later; and that the depositors' guaranty fund did not profit or benefit in any way by the transaction resulting in the issuance of the exchange in question.

Most of the facts are stipulated and the remainder are not in dispute. One E. C. Goerke and Charles Marshall were owners of the majority of the stock in the Richfield bank of which Goerke was president, and also of the State Bank of Papillion of which Goerke was president and Marshall cashier. June 26, 1926, Goerke drew his check for $5,000 on the Richfield bank (in which he had to his credit only $3.14), payable to Samuel A. Snider, president of the First National Bank of Osceola, Nebraska, who indorsed and deposited it in the Osceola bank to the credit of Goerke on June 28, 1926, and the same day it was sent for collection to the United States National Bank at Omaha, and by it to the Federal Reserve Bank, Omaha branch, which presented it for payment, together with two small items aggregating $68.80, not in controversy herein, to the Richfield bank by a cash letter July 1. The Richfield bank in payment, on July 1, issued its draft payable to the Federal Reserve Bank upon the Union State Bank of Omaha for $5,068.80, which is the bill of exchange involved in this proceeding. Prior to the presentation of this bill to the Union State Bank on July 3, payment was stopped by the Richfield bank by notification from Graham, its cashier. Thereupon the amount of said draft was charged back by the Federal Reserve Bank to the United States National Bank and by the United States National to the First National Bank of Osceola, which charged the same to the account of claimant, Snider, and it was paid by him, and he is now the holder of said draft.

The Richfield bank and Papillion bank were located about five miles apart. On June 30, 1926, Paul N. Graham, cashier of the Richfield bank, called at the Papillion bank

and was notified by Goerke that an item of $5,000 would appear against him that day in the Richfield bank, and Goerke as president thereupon drew a draft of Papillion bank on the Union State Bank of Omaha payable to the Richfield bank for $5,000, dated July 1, and delivered the same to Graham for the purpose of taking care of Goerke's check, Graham returned to Richfield, and on the following morning the Goerke check was presented, as above stated, and the bill in controversy issued. This draft of the Papillion bank was not credited to Goerke by the Richfield bank as a deposit, but was substituted for the Goerke check to Snider upon payment thereof. Late in the afternoon of July 2 Graham again called at the Papillion bank and found the same in the hands of the department of trade and commerce with bank examiners auditing the books. Goerke had disappeared the evening before and is now a fugitive from justice. At this time Graham was informed by the agent of the department of trade and commerce that the $5,000 draft which Goerke had given to the Richfield bank was fraudulent and without consideration, and that payment thereon had been stopped, and advised Graham to stop payment on the draft of the Richfield bank issued in payment of Goerke's check, which was done by Graham that evening by telegraph to the Union State Bank. Payment was stopped on the Goerke draft July 2, and the same has never been paid.

June 29, 1926, Goerke drew his check in favor of C. E. Marshall on the First National Bank of Osceola for $4,750 upon his credit set up by his previous check on the Richfield bank. This check was indorsed by Marshall and sent to the Union State Bank for the account of the Papillion bank, which was credited therewith. Thereupon the Union State Bank forwarded said check for collection to the First National Bank of Omaha which in turn cleared to the Federal Reserve Bank in Omaha, and it later mailed the same to the Osceola bank. The latter received the check, charged Goerke's account with the same, and remitted the amount thereof to the Federal Reserve Bank by draft on

the United States National, which paid the same and charged the bank. The claimant received assignments of the bill of exchange in controversy from the Federal Reserve Bank and the Osceola bank and is now the holder of the same.

The $4,750 item credited to the Papillion bank by the Union State Bank was paid and remained there, never having been withdrawn. On June 29, 1926, the Papillion bank had to its credit in Union State Bank $10,770.59; on June 30, $13,608.76; July 1, $9,288.59; and on July 2, $8,288.71. On July 3 the Union State Bank applied the sum of $8,288.71, which included the item of $4,750, upon bills payable to the Union State Bank from the Papillion bank.

The Papillion bank was taken over by the department of trade and commerce on July 3, 1926, and receiver appointed therefor July 6. It has never been determined as a fact whether the $5,000 draft drawn by Goerke in favor of the Richfield bank was fraudulent as against the Papillion bank or not; but it appears that the receiver of the latter is unable to discover from an examination of the books of the bank any consideration therefor. The fact remains, however, that out of these transactions the Papillion bank received credit with the Union State Bank to the extent of $4,750, which was applied in reduction of its indebtedness to that bank. Whether or not Goerke's draft was a fraud upon the Papillion bank, which seems quite probable, it is not claimed that Graham, cashier of the Richfield bank, the claimant, or the Osceola bank, was a party thereto or had any notice thereof; neither is it claimed that they had any knowledge of the failing condition or insolvency of the Papillion bank.

The crucial question for determination in this case is whether or not the Richfield bank, in consideration for the bill of exchange in controversy, "received money or its equivalent, or any fund or thing of value placed on deposit in, or at the command of, said bank in intention or effect," thereby entitling said bill to payment from the

guaranty fund. It has been held time and again in this state that these conditions must be present in the case of a deposit in order that the same may be properly charged against the guaranty fund; and holders of exchange are subject to the same conditions. As was said in *State v. Farmers Bank of Halsey*, 111 Neb. 117: "The term 'holders of exchange' as used in this section relates to those transactions where money or its equivalent has been deposited in the bank and a bill of exchange upon some other bank has been issued in lieu thereof."

The claimant contends that the draft of the Papillion bank signed by Goerke, president, and drawn upon the Union State Bank, in which the Papillion bank had sufficient funds to meet the draft, was the equivalent of money, within the meaning of the statute; while the receiver insists that because it does not appear that the Papillion bank received any consideration for the draft, and because the transaction was an attempt on the part of Goerke to defraud the Papillion bank, the whole transaction was tainted, and to allow the claim would be fraud upon the guaranty fund.

It was said by Letton, J., in *State v. American State Bank*, 112 Neb. 182, at page 186: "The transaction must be considered as it appeared to the parties at that time, and not as subsequent events may have changed the situation. That which would be good judgment under normal circumstances may prove to have been unwise in the light of extraordinary or unusual subsequent events, such as periods of unlooked-for financial depression." We think this is a correct statement of the law, and that in determining the problem before us we must consider the facts and circumstances as they existed on July 1, 1926, the date when the draft in question was issued, unaffected by what may have occurred subsequently. We have held that a check, equivalent to money for banking purposes, if accepted by a bank as the consideration for a time certificate of deposit, may amount to a deposit within the meaning of the bank guaranty law. *State v. South Fork State*

Bank, 112 Neb. 623. We find little difficulty in holding that the draft of the Papillion bank drawn by its president upon the Union State Bank, which had in its hands sufficient funds for payment, constituted, on July 1, an equivalent of money deposited in or received by the Richfield bank, in consideration for the issuance of its draft in payment of Goerke's check to Snider. But for the failure of the Papillion bank on July 2, an occurrence entirely beyond the control of any of the other parties to the transaction, the draft of the Papillion bank would, in all human probability, have been paid; but whether it would have been paid or not, at the time of its issuance the Papillion bank was a going concern and had to its credit in Union State Bank sufficient funds to cover. We fail to perceive how the failure of the Papillion bank, taking it over by the department of trade and commerce, and stopping payment of the draft could affect the rights of the holder of the draft which were fixed at the date of its issuance. None of the parties to this proceeding were connected with or had any knowledge of the fraud of Goerke, if one was attempted, and the transaction upon its face had all the appearance of a legitimate banking transaction. The fact that in the end, because of matters beyond its control, the Richfield bank never received the proceeds of the draft is not determinative of the question. It may easily happen that, through mistake of judgment or as the result of unforseen circumstances or unavoidable casualty, a transaction entered upon in good faith and for full value may result in a loss; but this would not ordinarily affect the rights of innocent third parties. It frequently happens that a note which is considered perfectly good at the time, discounted by a bank, is not paid when due and results in a loss; but this would not prevent the depositor of the proceeds of the discount from being protected by the guaranty fund. If, at the time the draft in question was issued, the holder was under the protection of the bank's guaranty fund, the subsequent acts of third parties resulting in loss would not release the fund from liability.

We think the receiver places too much stress upon the fact of the intention of Goerke to commit a fraud. It may be that the Papillion bank, by reason of such fraud, might escape liability upon its draft, but third persons, without notice of fraud, stand in a different position.

It is further contended by claimant that the guaranty fund received the benefit of the fund credited to the Papillion bank by the Union State Bank in the sum of $4,750, and that therefore it should not be heard to deny claimant's right. It is not possible from the record before us to determine the correctness of this contention. Before the guaranty fund could be said to be benefited, it would have to appear that the fund in the Union State Bank would have been available to the receiver of the Papillion bank for the payment of *depositors, exchange or other claims upon the fund.* It is argued that by the application of the fund to the bills payable of the Papillion bank, the guaranty fund was relieved *pro tanto;* but such bills payable were not claims upon the guaranty fund, and it is probable that the Union State Bank had the right to apply the fund as it did. But this question need not be further discussed in view of our holding as above indicated on the other proposition.

We conclude the bill of exchange is a proper charge against the guaranty fund, and that the district court erred in the contrary holding.

It follows that the judgment of the district court must be reversed and the proceedings remanded, with instructions to allow the claim as against the guaranty fund and order the same paid therefrom, if the assets of the bank are insufficient for that purpose.

REVERSED.

LEWIS PURVIS V. STATE OF NEBRASKA.

FILED JULY 6, 1928. No. 26322.

1. **Criminal Law: INCEST: QUESTION FOR JURY.** When a brother is charged, under section 9762, Comp. St. 1922, relating to

incest, with having had sexual intercourse with his own sister, the weight of the evidence is for the jury, and the verdict will not be disturbed where, as in the present case, such verdict is supported by sufficient evidence.

2. Incest: INFORMATION. When a defendant is charged with incest under section 9762, Comp. St. 1922, and the language of the information charges him with having "feloniously, rudely, and licentiously" committed the offense, such language is a substantial compliance with the statute.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and CHASE, REDICK and WHEELER, District Judges.

DEAN, J.

Lewis Purvis, aged 19, defendant, was informed against, tried, and convicted in Adams county, under section 9762, Comp. St. 1922, of having "feloniously, rudely, and licentiously" cohabited with Irene Purvis, his sister, some time in January, 1927. The jury recommended leniency. Upon the motion for a new trial being overruled, the defendant was sentenced to serve a term of five years in the state reformatory. From the sentence so imposed the defendant prosecutes error.

The prosecutrix testified that when the trial was on she was 16 and was then living at Hastings with her father and her brother Lewis. Her mother had been dead about a year. On the day that the offense was committed she was attending the public school at Hastings. From her evidence in respect of the facts it appears that a week or two after the holidays, in January, 1927, she returned from school in the evening and went upstairs to her bedroom, and thence to her father's bedroom, where, she testified: "I had intercourse with him (the defendant) * * * on the

bed. Q. Kindly tell the jury what you mean when you say that you had intercourse with him. * * * A. I told you once." At this point a colloquy followed between the cross-examiner and the prosecutrix, which was doubtless intended by defendant's counsel to develop palliating facts, if possible, in behalf of the accused. We do not however, for obvious reasons, find it necessary to insert here for publication more of the details of Miss Purvis' evidence in respect of the offense charged against the defendant. We deem it sufficient to say that, in view of the evidence before us and the law applicable thereto, this motherless girl of 16 found sufficient language with which to tell the jury just what happened to her in that upper bedroom of her father's home on that afternoon in January, 1927, upon her return from school. When repeatedly interrogated in respect of the offense, she repeatedly answered, "I told you once," or she used other words of like import. But counsel makes much of the fact that this immature girl, who was debauched by an unnatural brother, as the jury found, said that she did not "know now what the meaning of sexual intercourse is." In brief, the defense insists that the prosecutrix' failure to use the statutory term, "sexual," when testifying, was insufficient with the requirements of the statute, and that the state did not therefore prove the offense. We do not agree with counsel. We conclude that before the case was ended the offense was abundantly established, and of this the record leaves no doubt. Her language satisfied both the statute and the jury.

The chief of police was night captain at Hastings when the arrest was made. He testified that, when arrested, the defendant said "he had intercourse with his sister," and that he made the statement "of his own free will." He further testified: "Q. At that same time and place did Irene Purvis make any statements? A. Yes, sir. Q. And was Lewis Purvis present when she made those statements? A. Yes, sir. Q. What, if anything, did she say? * * * A. Miss Purvis stated she had intercourse with her brother

at 144 East 5th street, Hastings, Nebraska." On the state's rebuttal this witness testified that the defendant said that he used precautionary or preventive measures with his sister at the time, and that he admitted the fact of his guilt more than once when he talked to him. There is competent evidence to establish the fact that no offer of leniency was made as an inducement to the defendant to make the incriminating statements attributed to him at any time, and that he was not placed in fear, and that whatever statements he made were voluntary "and of his own free will." It also appears from the evidence of another witness that the defendant, when asked if this had ever happened before, answered: "Yes; once in August."

The defendant testified in his own behalf and denied the charge. He admitted that he talked with the chief of police when he was arrested, and said: "I did'nt deny it at first. * * * I didn't exactly tell them I done it." In his evidence he averred that the county attorney "read the law to me and told me what I would get out of this." When interrogated by the county attorney as to whether he was guilty, he answered: "I didn't own up to it then. * * * I didn't answer that right out." There is more evidence of like tenor that we do not find it necessary to repeat here. See 31 C. J. 384.

The defendant contends that he is not charged with the offense in the language of the statute, in that the information charges him with having "feloniously, rudely, and licentiously" committed the offense, whereas the statute reads "shall lewdly and lasciviously cohabit." This assignment is without merit. An accepted authority holds that the words "lascivious" and "licentious" are synonymous. Webster's New International Dictionary. Other exceptions are taken by counsel to the introduction of certain of the evidence, but we do not find that they are prejudicial to the substantial rights of the defendant. Counsel also contends that the jury were not properly instructed as to the law applicable to the facts, and in support of his contention cites *Kraus v. State*, 102 Neb. 690. We do not

think the citation is in point. And upon an examination of the instructions complained of we conclude that reversible error cannot be predicated upon the instructions submitted by the court. Nor did the court err in its refusal to give the four instructions requested by the defendant, from the fact that the substance of the instructions so tendered is incorporated in the language of those submitted to the jury of the court's own motion. Where a brother is charged, under section 9762, Comp. St. 1922, relating to incest, with having had sexual intercourse with his own sister, the weight of the evidence is for the jury, and the verdict will not be disturbed where, as in the present case, such verdict is supported by sufficient evidence.

An examination of the record convinces us that the refusal of the court to set aside the verdict and grant a new trial is clearly without error. The plea of defendant's counsel for leniency was apparently granted, in that the court imposed the minimum statutory sentence of five years, whereas the maximum sentence provided for by the act is fifteen years. In view of the facts and the law, the judgment of the district court is

AFFIRMED.

JAMES MCBRIDE ET AL., APPELLEES, V. WAYNE TAYLOR ET AL., APPELLANTS.

FILED JULY 6, 1928. NO. 26557.

1. **Appeal**: CONSTITUTIONALITY OF STATUTE. Where a litigant claims a statute is invalid because violative of some constitutional provision, such invalidity must be presented by the pleadings or in some other form in the trial court to be of any avail in this court, and such objections cannot, ordinarily, be raised for the first time in the appellate court.
2. **Banks and Banking**: GUARANTY FUND COMMISSION: EXECUTION. Where, under the provisions of section 1, ch. 30, Laws 1925, a state bank is in charge of the state guaranty fund commission, it is entitled to a reasonable time in which to determine whether the bank may be turned back to its officers and operated as a going concern, or shall be closed and its affairs wound up,

and during such time the assets of the bank are immune from seizure on execution.

3. ———: ———: "REASONABLE TIME." What is a reasonable time in which to make such determination, ordinarily, is not a question of law but one of fact, to be determined from the facts and conditions existing in the particular case.

4. ———: ———: EXECUTION. Where a judgment creditor of a state bank in the hands of the guaranty fund commission, pursuant to the provisions of section 1, ch. 30, Laws 1925, seeks to levy an execution upon the assets of the bank, on the theory that the assets of the bank are no longer immune to seizure on execution, because the commission has retained possession of the bank and its assets for an unreasonable time, it is incumbent upon such creditor to allege and prove that the commission has been in charge for more than a reasonable time in which to make such determination.

APPEAL from the district court for Dundy county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

J. F. Ratcliffe, for appellants.

Butler & James and *Perry & Van Pelt, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, EBERLY and HOWELL, JJ., and BEGLEY, District Judge.

GOOD, J.

This is an action to enjoin the levy of an execution issued to enforce collection of a judgment, recovered against a state bank while it was in the charge and under the control of the guaranty fund commission "for the purpose of making an investigation and examination of its affairs to determine whether solvency might be restored and to dispose thereof as provided by law." Defendants, who are the sheriff and judgment creditor, to the petition interposed a general demurrer, which was overruled. They refused to further plead, and the court entered judgment for the plaintiffs, enjoining the enforcement of, or attempt to enforce, the judgment, and execution issued thereon, "as long as the guaranty fund commission of the state of

Nebraska lawfully retains possession of the assets of the Citizens State Bank of Benkelman, Nebraska, pursuant to the provisions of section 1, chapter 30, Laws of Nebraska for 1925." The defendants have appealed.

The following salient facts are set forth in the petition: March 1, 1928, the department of trade and commerce of the state of Nebraska (hereinafter referred to as the department) took possession of the Citizens State Bank of Benkelman, a banking institution, organized under the laws of the state of Nebraska, and which will be hereinafter referred to as the bank. On March 20, 1928, the department transferred possession of the bank and all of its assets to the guaranty fund commission of the state of Nebraska (hereinafter referred to as the commission). Since March 20, 1928, the commission, through one of its special agents, has been in possession of the bank and its assets, under the provisions of section 1, ch. 30, Laws 1925, for the purpose of making an investigation and examination of the affairs of the bank to determine whether solvency might be restored and to dispose thereof, as provided by law. Attached to and made a part of the petition is a copy of instructions, issued by the secretary of the commission to the special agent in charge, which will be later referred to. On April 12, 1928, defendant Taylor recovered a judgment in the county court against the bank for merchandise sold and delivered, and on the same day filed a transcript of the judgment in the district court for Dundy county, and caused an execution to be issued thereon and placed in the hands of defendant Davis, sheriff of said county, for the purpose of levying upon the assets of the bank. The bank has numerous tracts of real estate situate in Dundy county.

The questions we are requested to determine are: (1) Under the facts, were the assets of the bank in the hands of the commission immune from seizure on execution, issued on the judgment in favor of defendant Taylor? (2) Was the judgment of defendant Taylor a lien upon real estate, standing in the name of the bank in Dundy

county? (3) Had a first and prior lien attached to the assets of the bank in favor of the depositors, as provided by section 8033, Comp. St. 1922, as amended by section 12, ch. 30, Laws 1925?

Section 1, ch. 30, Laws 1925, provides: "Whenever it shall appear to the department of trade and commerce, from any examination or report provided for by this article, that the capital of any corporation transacting a banking business under this article is impaired, that such corporation is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors, or upon the failure of such corporation to make any of the reports or statements required by the provisions of this article, or if the officers or employees of any bank shall refuse to submit its books, papers, and affairs to the inspection of any examiner, or if any officer thereof shall refuse to be examined on oath touching the affairs of any such bank, or if from any examination or report provided for by law, the department of trade and commerce shall have reason to conclude that such bank is in an unsafe or unsound condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, or if any such bank shall neglect or refuse to observe any order of the department of trade and commerce, such department may forthwith take possession of the property and business of such bank, and place it in charge of the guaranty fund commission, who shall thereafter conduct the affairs of said bank, and who shall retain possession of all money, rights, credits, assets, and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law."

The foregoing section clearly authorizes the commission to retain possession for a sufficient time in which to make an examination of the affairs of the bank and dispose

thereof as provided by law. Section 5 of said chapter 30 provides that if the commission, from its examination, shall determine that it is impossible to preserve the bank as a going concern, it shall communicate the facts to the attorney general who shall cause an application to be made to the district court for an order directing the commission to take charge of the business, assets and property of the bank and to wind up its affairs.

The defendants argue that the liquidation of an insolvent bank is a function of the judicial branch of the state government, and that any statute, which directly or in effect authorizes the liquidation of an insolvent bank by the guaranty fund commission, is unconstitutional, and that a statute, which authorizes the guaranty fund commission to retain possession of an insolvent bank for a period of three months, during which time the property of the bank is immune from seizure on execution, as provided by section 4, ch. 30, Laws 1925, is in conflict with both the federal and state Constitutions.

Whether the statutes involved are in conflict with the Constitution is not a question presented by the record. Defendants demurred to the petition on the ground that the facts stated were insufficient to constitute a cause of action in favor of the plaintiff. It is a rule that where a statute is, for any reason, claimed to be violative of the Constitution such invalidity must be presented by the pleadings or in some form to the trial court, and that such objection cannot ordinarily, be raised for the first time in the appellate court. *Clearwater Bank v. Kurkonski,* 45 Neb. 1; *Farmers State Bank v. Nelson,* 116 Neb. 541. The demurrer does not challenge the constitutionality of the statutes involved; nor is there anything in the record from which it appears that such question was ever submitted to or determined by the trial court. Under the circumstances, we decline to consider or pass upon the constitutionality of the statutory provisions involved in this action.

Defendants concede that under the provisions of section

1, ch. 30, Laws 1925, the commission is entitled to a reasonable time in which to determine whether it is impossible to preserve the bank as a going concern, and that during such time the assets of the bank in the hands of the commission are immune from seizure on execution of judgment against the bank. But they further urge that, since the commission has been in charge for 23 days, such period was more than a reasonable time in which to make an examination to determine whether the bank should be closed and liquidated or could be operated as a going concern, and further contend that the instructions, issued to the special agent of the commission in charge of the bank, show that it had already been determined that the bank was insolvent and should be liquidated, and that the commission could not, therefore, operate the bank as a going concern and hold the bank's assets immune from seizure on execution.

In the instant case we are not called upon to determine whether the three months, allowed to the commission by section 4, ch. 30, Laws 1925, is more than a reasonable time in which to determine whether the bank shall be turned back to its officers as a going concern, or closed and liquidated by means of receivership, because that question involves the validity of the statute which, as heretofore pointed out, is not raised and presented by the record. In the instant case the commission had been in charge but 23 days. The record does not disclose the character, extent, location or condition of the bank's assets. For aught that appears, they might include properties, widely separated in distance and of such a doubtful or peculiar nature or character that considerable time might be required to determine their value. Furthermore, it might appear that the capital was to some extent impaired, and the stockholders of the bank were desirous of restoring the impaired capital, and what would be a reasonable time in which to restore the impaired capital could only be determined when all the facts and circumstances were known.

In their brief defendants admit that when a state bank is in the hands of the commission, pursuant to the provisions of section 1, ch. 30, Laws 1925, the assets of the bank are immune from seizure on execution during a reasonable time, for the commission to ascertain and determine whether the bank may be continued as a going concern or be closed and its affairs wound up. Under this admission, defendants would be required to show that an unreasonable time in which to make such decision had elapsed. This they have failed to do.

Defendants argue that the insolvency of the bank and the necessity for winding up its affairs had been previously determined by the commission, and that such fact is disclosed by the instruction issued by the secretary of the commission to the agent in charge, a copy of which instruction is attached to and made a part of the petition.

An examination of the instruction discloses that it is a form letter, or general form of instruction, issued to agents of the commission who are placed in charge of state banks. Nowhere in this instruction is any particular bank referred to. The instruction will apply both to the period of preliminary examination to determine whether the bank could be operated or should be closed, and to the period after such determination has been made. The specific allegation of the petition, that the commission is in charge of the bank for the purpose of making the examination, is admitted by the demurrer. We must therefore assume that when this action was brought the commission had not determined whether the bank could be turned back to its officers and operated as a going concern, or whether it should be closed and its affairs wound up.

The conclusions reached render it unnecessary to consider other questions argued in the briefs. The judgment of the trial court is right and is

AFFIRMED.

DEPARTMENT OF TRADE AND COMMERCE OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. BANKERS AUTOMOBILE INSURANCE COMPANY, CROSS-APPELLEE: GEORGE M. CHRISTIAN ET AL., INTERVENERS AND CLAIMANTS, APPELLEES AND CROSS-APPELLANTS.

FILED JULY 6, 1928. No. 26274.

1. **Corporations:** NOTICE OF BY-LAWS. Under the terms of section 469, Comp. St. 1922, constructive notice of the provisions of corporate by-laws will be imputed to third parties only "if a copy thereof, with the names of the officers appended thereto, is posted in some conspicuous place at the places of doing business of such corporation, subject to public inspection."
2. **Principal and Agent:** NOTICE TO AGENT. A principal is only chargeable with notice communicated to, or knowledge acquired by, his agent in another transaction at another time, and when he was acting for another principal, when sufficient proof is made that such knowledge or notice was actually present in the mind of the agent at the time of the transaction in question.
3. ———: ———: BURDEN OF PROOF. The burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion, and in a different transaction, with which his present principal had no interest or connection, is upon the party who seeks to charge the principal with notice by reason of such knowledge.
4. **Corporations:** STOCK AS COLLATERAL: PRIORITY OF LIEN. The lien of a holder of corporate stock as collateral security for the debt of the stockholder is superior to the lien of the corporation itself on said stock for a debt due to the corporation from the stockholder, when the corporate lien arises under a by-law which has never been posted, as required by law, and as to which the collateral holder had no notice, express or implied.
5. ———: ———: NOTICE. Notice to a corporation that the corporate stock of such corporation is held as collateral security for a debt of the stockholder is timely when given before an adversely interested party has changed his position because of the want of such notice.
6. ———: INTEREST ON DIVIDENDS. Under the facts of this record, the allowance of interest as made by the trial court, approved.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Marcus L. Poteet and *Hall, Cline & Williams,* for appellant.

C. M. Skiles, A. S. Johnston, Allen & Requartte, Charles E. Matson and *Foster & Anderson, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

EBERLY, J.

Upon petition of the department of trade and commerce a receiver was appointed by the district court for Lancaster county, Nebraska, for the Bankers Automobile Insurance Company, a Nebraska corporation, and thereafter on April 10, 1921, an order was made liquidating that company. A controversy arising as to who was entitled to liquidating dividends on certificates of stock No. 1 for 480 shares and No. 5 for 320 shares of the capital stock issued by the insurance company to one Charles Maixner, issues were framed and a trial had.

So far as concerns the parties now active in the litigation before this court, and as to questions now being insisted upon, it may be said that the district court for Lancaster county, Nebraska, found in favor of (1) American State Bank; (2) George M. Christian and Charles A. Herman; (3) E. G. Maggi; with "right of priority in order named," and found generally against all other claimants, including the receiver of the Bankers Automobile Insurance Company. From this the last named appeals, and the defendants Christian and Herman have also filed a cross-appeal.

The evidence in the record supports the finding of fact of the district court which, for the purpose of this case, may be summarized briefly as follows: That Charles Maixner on or about October 1, 1917, being the owner of 800 shares of stock in the Bankers Automobile Insurance Company, represented by the certificates last referred to, secured a loan from the American State Bank;

as part of that transaction he executed and delivered to that bank his promissory note in the sum of $20,000, and also as collateral security therefor assigned, delivered and pledged the 800 shares of stock, then and there expressly stipulating, by the terms of the note executed, that such stock should be held by that bank "as collateral security to any indebtedness that he then or thereafter might owe the American State Bank while the stock was held by it as collateral;" that of this indebtedness thus secured there remained unpaid to the receiver of the American State Bank, at the time of trial herein, the sum of $9,365.61.

It is fairly established by the evidence that the entire proceeds of this loan thus made to Maixner, entered into, was represented by and formed the sole consideration of two certificates of deposit, aggregating $20,000, on that day issued by the American State Bank. While the record before us does not disclose the payee named in these certificates, yet the inference is amply sustained that, substantially contemporaneous with their issuance, they were delivered to the Bankers Automobile Insurance Company either as the payee named therein or as indorsee of Maixner and were received by it in substitution of other assets previously owned and held by that company. The assets thus taken out of the treasury of the insurance company had been received by it from Maixner, and at the time of their return to him may be inferred to have been of very doubtful value, and probably of no value whatsoever.

At the time of this transaction it is to be remembered that Dwiggins, who was the sole person to act for, and in behalf of, the bank in making the loan, and who was then a director, its president, and the managing officer, was also a director of the insurance company, and the owner of 20 shares of its capital stock. The result of the transaction, considered as an entirety, was to increase the value of all the stock of the insurance company, including the 20 shares of stock then owned by Dwiggins to the extent of the loan. It was, therefore, a transaction which

operated unquestionably for Dwiggins' private benefit as well as for the benefit of the insurance company.

It may be said in passing that the record sustains the conclusion that the relations between Maixner and Dwiggins at this time was of a close and confidential nature; that Dwiggins personally transacted all business between his bank and the former.

The record also discloses that on December 22, 1920, as security for a loan from the defendants George M. Christian and Charles A. Herman to said Charles Maixner, the latter assigned in writing any "equity which he might have in the stock referred to as collateral security for the amount of such loan." A similar assignment was made to E. G. Maggi subject to the rights of the American State Bank and Christian and Herman.

While the right to recover at all is challenged, there is no complaint as to the amounts adjudged due to the respective parties above named save and except as to the allowance of interest. The receiver of the Bankers Automobile Insurance Company insists that he is entitled to the liquidating dividends, and that his rights are prior to the prevailing parties in the district court because of the fact that the by-laws, alleged to have been adopted by the board of directors of the Bankers Automoboile Insurance Company, contain a provision as follows: "The company reserves a first and paramount lien upon the shares of stock and the certificates representing the same to secure the payment of any debt or obligation of the owner thereof in tort or in express or implied contract, to the company."

The claim of the receiver of the insurance company is based wholly upon the alleged fact that Dwiggins had actual knowledge of the adoption of a by-law by the insurance company at the time of the first meeting of its board of directors on August 10, 1917, reserving a first and paramount lien on all the stock of the insurance company to secure the payment of any debt or obligation of the owner thereof in tort or in express contract, and that,

therefore, his knowledge was imputable to his bank at the time the loan was first made and that institution parted with its money. The only evidence in the record tending to sustain this contention is a copy of the minutes of the first meeting of the board of directors. Dwiggins was, according to the secretary's minutes, one of the ten directors-elect present. At this meeting the officers of the insurance company were elected; its articles of incorporation were amended; arrangements were made and entered into for the sale of $250,000 worth of its common and preferred stock, and one of the items of business transacted is referred to in the record as "Mr. Charles Maixner moved the adoption of the following by-laws for the Bankers Automobile Insurance Company," which included more than seven typewritten pages. This motion was seconded by Mr. Kenyon and unanimously adopted.

The record does not, however, disclose that the by-laws adopted were at any time read to, or in the presence of, the assembled directors. There is no affirmative evidence in the record save and except that Dwiggins was present at the meeting during which he voted for the Maixner motion to adopt the by-laws.

It may be said in passing that the by-law quoted and which is the foundation of appellant's contention was not "posted" as required by section 469, Comp. St. 1922. It appears that this section was adopted from Iowa by the territorial legislature of 1866, and since that date has remained on the statutes of both states unmodified. While it has not as yet been construed by this court, it has been repeatedly before the supreme court of Iowa. The rule announced and adhered to by that tribunal is: "Constructive notice of the provisions of the by-laws will be imputed to third parties only if a copy thereof is posted in the principal place of business of the corporation, so as to be subject to public inspection; and, unless the statute is complied with in respect to posting, a stranger will not be bound thereby." *Iowa-Missouri Grain Co. v. Powers*, 198 Ia. 208.

It is obvious, therefore, that the by-law relied upon by the appellant can be given no force and effect in this proceeding in the absence of actual notice to the American State Bank.

The insurance company, however, insists that knowledge of the existence of the terms of its by-law "reserving a lien" is imputable to the bank because Dwiggins, as president and director, represented the bank in the making of the original loan of $20,000 on October 1, 1917; that the same Dwiggins, as a stockholder of the insurance company, was present at the organization meeting of that corporation that convened August 10, 1917, at 11 a. m., and was at that time elected a director; that by Dwiggins as such director, in company with the nine other directors then elected, a set of by-laws containing the provision reserving a lien upon stock was duly adopted; that, therefore, what Dwiggins knew as a director of the insurance company on August 10, 1917, he must be deemed to know, as president of the bank and director on October 1 following, when he made the original loan and accepted the stock as collateral security thereto.

This court has long declared the rule that—"It is the duty of an agent to make known to his principal all facts concerning the service in which he is engaged that come to his knowledge in course of his employment, and this duty he is, in a subsequent action between his principal and a third person, conclusively presumed to have performed." *Modern Woodmen of America v. Colman,* 68 Neb. 660. See, also, *Pringle v. Modern Woodmen of America,* 76 Neb. 384.

It is to be noted, however, in the present case, that whatever information Dwiggins actually acquired at the organization meeting of the insurance company was not acquired by him in the course of his employment as a bank officer, and was obtained in a transaction in which the bank at the time had no interest whatever.

The distinction involved in this case, in principle, is well stated in one of the old cases in another connection in the

following words: "Though notice to a man's counsel be notice to the party; yet where the counsel comes to have notice of the title in another affair, which it may be, he has forgot, when his client comes to advise with him in a case with other circumstances; that shall not be such a notice, as to bind the party." *Preston v. Tubbin,* 1 Vern. (Eng.) 286.

It is obvious that to hold a principal chargeable in a present transaction with what his agent may have casually read or heard a half century prior thereto, when he was not acting in behalf of such principal or engaged in a transaction in which such principal had any interest whatever and which may have been by him wholly forgotten, would not only be unjust but would amount to a manifest absurdity. On the other hand, cases could well be imagined where the nature of the facts were such that the prior transaction would be indelibly impressed on the mind of such agent, and such knowledge in a present transaction should be justly chargeable to his present principal.

Without an extended discussion of the authorities or the reasoning upon which they are based, it may be said that the controlling rule, applicable to the facts above suggested, appears to be: "A principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction at another time and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent at the time of the transaction in question." *Constant v. University of Rochester,* 111 N. Y. 604. See, also, *Distilled Spirits,* 11 Wall. 356; 3 Thompson, Corporations (3d ed.) sec. 1763; 4 Fletcher, Cyclopedia Corporations, secs. 2221, 2222; 2 Mechem, Agency (2d ed.) sec. 1809.

The question, therefore, in its essentials, is not what the man who is now acting as an agent formerly heard or saw, but what he now actually remembers. Concededly, the facts involved and to which his knowledge relates may be of such a nature as to necessitate as a presumption of fact that they were remembered when the subsequent

transaction in which he officiated as agent occurred. Such, indeed, was the case in *Henry v. Omaha Packing Co.*, 81 Neb. 237.

But the facts disclosed by the record in the present case are not of such a character. Here, from nothing shown but attendance at a corporate meeting, it is sought to impute actual knowledge at a subsequent time of a single provision of a corporate by-law there adopted. No reading of these by-laws of which this provision formed a part by, to, or in the presence of, Dwiggins either prior to, at the time of, or after their adoption, is disclosed. No evidence appears of any discussion of their provisions. A mass of business transactions and details transacted at the same meeting, pertaining to the commencement of the business for which the insurance company was organized, is shown by the secretary's record, covering 12 typewritten pages.

Considering the record as an entirety, we cannot judicially say that it establishes as a fact that knowledge of the provisions of the by-law pertaining to the reservation of a lien on stock was in Dwiggins' mind at the time he first made the loan which forms the foundation of this litigation. Indeed, it may be said that no business man, acting with good faith, exercising reasonable care, with such knowledge in his mind, would have carried out the transaction of making the original loan by the bank in the manner presented by this record. Under the circumstances established it could have occurred in the manner disclosed by the record only if actual knowledge of the existence of the by-law in question was wholly absent from the mind of the representative of the bank.

In this connection it is also to be remembered that the well established rule is, that the burden of proof to show that an agent, in a transaction for his principal, had in mind knowledge gained by him on a former occasion and in a different transaction, is upon the party who seeks to charge the principal with notice by reason of such knowl-

edge. *Constant v. University of Rochester*, 111 N. Y. 604, 2 L. R. A. 734.

The form of the issues in the present case imposes this burden upon appellant, and this he has failed to sustain. It follows that the rights of the bank, at the time of making the loan, were in no manner affected by the provisions of the by-law hereinbefore quoted.

Neither can we sustain the contention that the rights of the bank, under the facts in this record, were subsequently impaired by failure to give notice of the pledge to the insurance company.

At the annual election of the corporate officers following the 10th day of August, 1917, Dwiggins was not only selected director but, for the first time, was duly elected secretary of this institution. The pledged stock was then in his actual custody and control as the managing officer of the bank. It was daily before him; it was subject to regular examination by the board of directors; was checked, examined and reported on by them in the ordinary course of business of the bank. The facts of the transaction were not therefore a mere matter of doubtful memory or of knowledge casually acquired. As a presumption of fact, fairly deducible from the evidence, Dwiggins, when he became secretary of the insurance company, actually had the knowledge of the existence of the pledge of the stock as an individual which, transmitted to him in his capacity as secretary by the bank, would have fully conformed to the contentions of appellant. It would seem that his knowledge then in his mind would thus be imputable to the insurance company. This presents, however, a question unnecessary to determine in the present case.

It further appears that actual knowledge of the pledge of stock was given to the representative of the insurance company on December 13, 1922. There is neither statute nor by-law in the record which fixes the time or manner when notice of pledge of stock is required to be given, and in any event, so far as the evidence shows, the delay which actually occurred was without prejudice to the appellant.

There was no extension of credit by the insurance company to Maixner on the basis of the record ownership of the pledged stock. Neither the situation nor relation of the parties was in any manner changed in the meantime.

It follows that, under the circumstances thus narrated, no rights can be predicated by the insurance company on the failure to register the stock at the time of the pledge. *Iowa-Missouri Grain Co. v. Powers, supra.*

The trial court, in its decree, allowed interest on the dividends accumulated on the 800 shares of stock which had been withheld from those entitled thereto. This action is challenged. It would seem that the principle enunciated in *Armstrong v. American Exchange Nat. Bank,* 133 U. S. 433, and in *Chemical Nat. Bank v. Armstrong,* 59 Fed. 372, and 23 R. C. L. 104, sec. 115, is applicable to the present situation, and that no error was committed by the district court in its disposition of this question.

We have not overlooked the other questions presented and argued in the briefs of the parties in this case. It is thought that the determinations made in this opinion are decisive and controlling.

It follows, therefore, that the judgment of the district court is correct, and the same is AFFIRMED.

STATE, EX REL. OTOE COUNTY AGRICULTURAL ASSOCIATION, APPELLEE, V. J. ED. WALLEN ET AL., APPELLANTS.

FILED JULY 6, 1928. No. 26592.

1. Agriculture: COUNTY AGRICULTURAL SOCIETIES: CONSTITUTION AND BY-LAWS. Chapter 13, Laws 1927, construed, and *held* to limit and restrict the power of adoption of constitution and by-laws in the organization of county agricultural societies, as therein provided, to such whose terms and provisions are in substantial conformity with "rules and regulations" adopted, or to be adopted, by the state board of agriculture, and for this purpose furnished by and through its "usual and proper officers."

2. ———: ———: ORGANIZATION: RULES AND REGULATIONS.

That the right, duty and power of the state board of agriculture to prepare and adopt reasonable rules and regulations pertaining to the organization of county agricultural societies, and covering the subject of the constitution and by-laws to be adopted thereby, were not in any manner affected by the enactment of chapter 2, Laws 1905, or any subsequent amendments thereto; and are and remain full, ample and complet

3. ———: ———: RULES AND REGULATIONS. That substantial compliance with such rules and regulations, so adopted and furnished, is essential to entitle a subordinate society, upon its organization, to recognition and to the financial support from the county board provided for by this act.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed.*

George H. Heinke, for appellants.

D. W. Livingston, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and CHASE, REDICK and WHEELER, District Judges.

EBERLY, J.

This, an action in mandamus, was brought by an organization styling itself the Otoe County Agricultural Association against the members of the board of commissioners of Otoe county, Nebraska, to require the latter "to include in the annual estimate for taxes for the year 1928, as a proposed levy, such part of one-fourth mill as will raise $2,000 for the use and benefit of relator as a society existing under section 6, ch. 13, Laws 1927, and thereafter at the time fixed by law, and in the manner provided by law, to include said amount for said purpose in the annual levy for taxes made for the year 1928."

In the pleading which constitutes the basis of the application it is alleged on behalf of the relator in substance that it was duly formed and organized under section 6, ch. 13, Laws 1927, and has, in all things, conformed to the requirements thereof, and "had adopted a constitution and by-laws for the government of said organization in conformity with law."

In addition to another defense pleaded, but the consideration of which is not necessary for our present purposes, the allegations of this pleading were denied by the respondent. On this issue there was a trial to the court who found in favor of the relator, and directed the writ to issue as prayed. Respondent appeals.

The real controversy between the parties turns on the proper construction of the following language of section 6, ch. 13, Laws 1927: "Whenever twenty (20) or more persons * * * shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the usual and proper officers."

It is apparently conceded by the parties that a substantial compliance with this section, including the provision quoted, is a prerequisite to a valid organization, and to the right of relator to maintain the present action. The respondent insists that the statutory words, "furnished by the usual and proper officers," lawfully designate the state board of agriculture acting by and through their usual and proper officers. If this construction is correct, the appellant must prevail. The evidence in the record fails to establish that the constitution and by-laws in the instant case were not so adopted. The undisputed testimony of Mr. Severe, president of the relator, on this subject, is: "Q. Now you were present when the constitution and by-laws were adopted? A. Yes, sir. Q. Was the constitution and by-laws furnished you by the state board of agriculture? A. No, sir. Q. Was it ever submitted to the state board of agriculture for their approval? A. I couldn't tell you. It was the Cass county rules that we went by. Q. Had you ever submitted them to the state board of agriculture? A. No, sir. Q. And they were not furnished to you by the state board of agriculture? A. No, sir."

The form of the issues on which the case was submitted in the court below imposed the burden of proof upon the relator to establish a substantial compliance with the terms of the statute providing for its organization. In reference to Mr. Severe's evidence in the organization of relator,

"It was the Cass county rules that we went by," it may be said that a "Cass county agriculturel society was organized under a special act of the territorial legislature, approved January 25, 1856." If this is the society referred to by Mr. Severe, in view of the terms of the statute of its creation, obviously a compliance with its rules affords no basis for an inference that in so doing the requirements of the present law were met.

We, therefore, address ourselves to ascertaining the proper construction of the words, "shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the usual and proper officers," as this is the real question involved in the appeal before us.

As preliminary to this consideration, it may be observed that there are few guides to construction more useful than that which directs attention to the prior condition of the law to aid in determining the full legislative meaning of the statutory change thereof. The legislative department is supposed to have a consistent design and policy and to intend nothing inconsistent or incongruous. *Cummings v. Everett*, 82 Me. 260.

Then, too, it is to be remembered that—"Agricultural societies are not corporations within the ordinary meaning of the term, but rather agencies adopted by the state for the purpose of promoting the interests of agriculture and manufacturing." *State v. Robinson*, 35 Neb. 401. See, also, *State v. Miller*, 104 Neb. 838.

Our first general legislation on this subject in this jurisdiction was "An act to encourage agricultural pursuits in the territory of Nebraska, approved January 12, 1860." It appropriated $300 to be awarded by the territorial board of agriculture as premiums in various branches of agriculture.

In 1866 (Rev. St. 1866, p. 3) there was adopted by the council and house of representatives "An act for revising, amending, consolidating and reenacting * * * laws of a general nature." Part 1 of chapter 1 of this act was devoted to the subject of agriculture. In section 1 there-

of appears the following: "Whenever twenty or more persons, residents of any county of the territory, shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeably to the rules and regulations to be furnished by the Nebraska territorial board of agriculture hereafter created, and shall have appointed the usual and proper officers; and when the said society shall have raised and paid to the treasurer * * * fifty dollars,"—it shall be entitled to receive financial support from the county as in said act set forth. Sections 2, 3, 4, 5 and 7 of this act provided, among other things, that societies thus organized were corporations; enumerated their powers and provided the manner, extent and purpose of the exercise thereof. Sections 8 to 11, following and inclusive, created the Nebraska territorial board of agriculture, referred to in the above quotation, defined its powers, duties and purposes.

It is plain from a reading of this act that sections 1 to 11, inclusive, constituted a complete plan for the promotion of agriculture, and together distinctly evidence a definite legislative policy on that subject. The county society, provided for in article 1 heretofore quoted, is expressly constituted a "subordinate society" to the territorial board. The chief officer of such "subordinate" society was, in terms, made an *ex officio* member of the latter. Annual meetings were provided for to be participated in not only by the members of the territorial board, but by the members thus *ex officio* created for the purpose of deliberating and consulting as to the wants, prospects and conditions of the agricultural interests throughout the territory. At these annual meetings the subordinate county societies were required to make reports in the manner prescribed.

In 1879 a further act was passed entitled, "For the government, support, and maintenance of the state board of agriculture," etc. (Laws 1879, p. 396), which, while retaining the fundamental plan on which the previous legis-

lation proceeded, amended, extended and amplified and made more definite the legislative intention embraced in the act of 1866 referred to. Under its terms the name "state board of agriculture" was substituted for the designation "Nebraska territorial board of agriculture," and the rights, powers and duties of county agricultural societies were more definitely enumerated, and the making of more complete and extended reports by the latter to the state board of agriculture was enjoined. Sections 2 to 11, inclusive, of this act of 1866, were repealed by the act of 1879, but section 1 of the territorial act of 1866 was retained. Excluding from consideration section 1 for the present, it may be said of this act of 1879 that, though the legislation in question has been subsequently amended in minor particulars and important additions made thereto, its provisions, so far as the general plan and policy are evidenced thereby, remain substantially unchanged.

The state board of agriculture still remains the ultimate, controlling agency which, in addition to supervising the holding of the state fair, gathers information, makes reports, and functions as contemplated by that act, and the county agricultural societies still retain the descriptive designation, "subordinate society," and are required to make their stated reports and carry on in the same subordinate capacity that was contemplated by the original act of 1879.

Section 1 of the territorial act of 1866 hereinbefore quoted though amended from time to time, was never repealed but has, at all times, constituted an essential part of this legislative plan. Indeed, the general policy of the state, controlling the manner and method of organization of "subordinate" societies, as evidenced by the territorial act of 1866, has been continued through all amendments and remains substantially unchanged in chapter 13, Laws 1927. Summarized, these organization requirements, thus continued in the statutes, are: (1) Twenty residents of any county; (2) organized into a society for the improvement of agriculture within said county; (3) adoption by

such persons so organizing of "a constitution and by-laws," the terms of which shall conform to the requirements imposed upon them from without the subordinate society; (4) the raising of $50 by the membership for society purposes annually.

In 1881 (Laws 1881, ch. 1) section 1 of the act of 1866 was amended by substituting for the words, "Nebraska territorial board of agriculture," the words, "state board of agriculture."

It is also to be noted that, from the time of its first enactment in 1866 continuously down to the adoption of the amendment of 1905, the language of the portion of this section pertinent to the question presented for decision in this case (excepting as to change of name in 1881) was: "Shall have adopted a constitution and by-laws agreeable to the rules and regulations furnished by the state board of agriculture, and shall have appointed the usual and proper officers."

It is quite obvious that this provision just quoted had a definite and important place in the legislative scheme before us. Through it there was available valuable information to those organizing subordinate societies. It was also, in fact, a statutory safeguard provided for the benefit of the taxpayer. Under its terms public moneys, devoted to this public purpose, were required to be expended, "agreeable to rules and regulations" prescribed by a disinterested public agency, the state board.

Then, too, the annual and stated reports required of the county society, after organization, not only provided a public source of information to those interested in the subject to which they related, but the provisions of the act of 1879 now carried as section 8, Comp. St. 1922, assured the submission of such reports of such a nature and in such form as afforded ample opportunity to the state board to check the compliance of the subordinate societies with the rules and regulations it had previously prescribed for their government.

It will thus be seen that the provision quoted not only

answered a definite public purpose but, indeed, was essential in carrying out a well considered public policy.

In 1905 this section was amended by chapter 2, Session Laws of that year. The subject of the amendment was expressed in the bill as "county aid," and its apparent object was to change the basis for the computation of the amounts due to county agricultural societies from their respective county boards as the public contribution to their support. But in the opening sentence of the body of this amendatory act, while the verbiage of the law theretofore existing was retained, the words, "by the state board of agriculture," and "shall have appointed," appear to have been omitted. The sentence which, in the old law, included the words last quoted, in this amendatory act of 1905 as passed read: "Whenever twenty or more persons * * * shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws * * * furnished by the usual and proper officers," etc. The words last above quoted were carried through all subsequent amendments to this section unchanged and, as such, appear in chapter 13, Laws 1927.

What was the effect of this omission? The status of existing county agricultural societies thereafter remained unchanged. They are still "subordinate governmental agencies" reporting to their superior, the state board of agriculture. The latter is still authorized to adopt rules and regulations to which other provisions of the governing statute still require obedience and compliance on the part of the "subordinate" societies. Comp. St. 1922, sec. 8. Nor was the status of county agricultural societies, in process of organization, changed. They possessed the same, no greater or other rights, and were subject to the same limitations that had theretofore existed, under this amendment. Even their right to adopt a constitution and by-laws still remains limited and restricted to the same extent by the legislative requirement that the constitution and by-laws so adopted must be "agreeable to the rules and regulations furnished" from a source outside the subordinate

society. The exercise of this power to limit and restrict the action of the powers of the subordinate society necessarily involves the exercise of power by a superior. The statute of this state in express terms makes the county agricultural societies "subordinate" to but one governmental agency, viz., the state board of agriculture.

Indeed, the question here reduced to its elements is: Has the omission of the words referred to changed the source of the statutory restrictions involved? There can be no question but what the statutory restrictions theretofore existing still exist in their entirety. Conceding that the designation "usual and proper officers" as used in the act of 1905, and subsequent amendments thereto, considered in and of itself might be ambiguous, it is not necessarily so. This designation in that act is used solely wth reference to the "rules and regulations" to be furnished, and the sources that had usually furnished them. The only officers who ever furnished, or could have furnished, these "rules and regulations" prior to the adoption of the amendment of 1905 were the officers of the state board of agriculture. The moment the amendment of 1905 became a law, the designation employed therein, "usual and proper officers," could apply solely to the officers of the state board of agriculture.

As before the adoption of that amendment, so thereafter this state board continued the sole superior agency of the state to which the statute, in express terms, makes county agricultural societies subordinate. We do no violence to the language employed in construing the word "usual" in the connection in which it here appears, and especially in view of its close association with "rules and regulations" as referring to the course of proceedings pertaining to these matters as the same was established and carried on prior to the adoption of the amendment of 1905, which the latter evidences no intent to change.

This conclusion is strictly in harmony with, and in advancement of, the public policy evidenced by all of the statutory provisions relating to this subject when construed

as an entirety. Indeed, when the amendment of 1905 is analyzed and construed in the light of the circumstances then existing, and as part of the legislation then in force, keeping in view the manifest principles of its enactment, as evidenced by the other provisions therein contained, the conclusion seems inevitable that the omission of the words "state board of agriculture," and "shall have appointed the," was an omission due wholly to inadvertence, and, due to the fact that the attention of subsequent legislators has not been challenged to the situation, has been unwittingly carried through subsequent amendments and compilations. On this basis the well-established rule applicable to the situation is: "Where it appears from the context that certain words have been inadvertently omitted from a statute, the court may supply such words as are necessary to complete the sense and to express the legislative intent." 36 Cyc. 1127. See, also, *Orvil v. Woodcliff*, 64 N. J. Law, 286; *Jones v. Mail & Express Pub. Co.*, 30 N. Y. Supp. 335; *Morris v. People*, 4 Colo. App. 136; *Peoria & Pekin Union R. Co. v. People*, 144 Ill. 458; *Loverin v. McLaughlin*, 161 Ill. 417; *Clark & Co. v. Kent*, 80 Ill. App. 128; *Gustavel v. State*, 153 Ind. 613; *Landrum v. Flannigan*, 60 Kan. 436; *Commonwealth v. Barney*, 24 Ky. Law Rep. 2352; *Loper v. State*, 82 Minn. 71; *Earhart v. State*, 67 Miss. 325; *People v. Wells*, 65 N. Y. Supp. 319; *Territory v. Clark*, 2 Okla. 82; *Hutchings v. Commercial Bank*, 91 Va. 68; *United States v. Burr*, 159 U. S. 78.

At all events it follows, therefore, that the duty of the county agricultural society to adopt a constitution and by-laws agreeable to the rules and regulations furnished by the board of agriculture remains unaffected by the change of the wording first made in 1905, and which is continued in the act of 1927. It also follows that the duty of the state board of agriculture to provide, through its usual and proper officers, and furnish rules and regulations agreeable to which the constitution and by-laws of the subordinate society must be framed, still continues; and that substantial compliance with the rules and regulations thus fur-

nished is essential to the proper organization of subordinate county societies; that the relator has wholly failed to establish that the constitution and by-laws adopted by it are agreeable to such rules and regulations because of such failure was not entitled to the relief for which he prayed.

The judgment of the district court in awarding the writ of mandamus is, therefore, reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

R. O. BROWNELL, RECEIVER, APPELLEE, V. HERMAN C. RUWE, APPELLANT.

FILED JULY 6, 1928. No. 26136.

Banks and Banking: PURCHASE OF NOTES: NOTICE. Where a bank cashier, being the sole managing officer of the bank, purchases notes from himself for the bank and the bank ratifies the act and brings suit upon the notes, it is chargeable with his knowledge of defects in the notes.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Reversed.*

Gray, Brumbaugh & McNeil, C. H. Kubat and *J. L. Kaley,* for appellant.

Courtright, Sidner, Lee & Gunderson, C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

BEGLEY, District Judge.

Action to recover upon two promissory notes for $2,500 each. The defense was lack of consideration and fraud in the inception of notes.

At close of testimony the trial court directed a verdict for plaintiff for the full amount, and from the overruling

of the motion for a new trial and judgment thereon, the defendant appeals.

The pleadings and evidence disclose that on March 19, 1918, the Lion Bonding & Surety Company duly increased its capital stock from $252,000 to $1,000,000, and gave an option to E. R. Gurney and W. O. Van Wyck for the purchase of the authorized addition at a price of $145 a share, net to the company. Gurney and Van Wyck organized the Bankers Sales Agency, a partnership, to sell the stock at $200 a share. Gurney and Van Wyck were officers of the Lion Bonding & Surety Company, and Gurney was also president of the First Bank of Nickerson, and also interested financially in some fourteen other banks. On July 18, 1918, one C. E. Negus appeared at defendant's farm home, representing himself as cashier of the First Bank of Nickerson, and that he was acting for the Bankers Sales Agency in selling stock of the Lion Bonding & Surety Company, and that the sales were being made through the banks of the state of Nebraska by said agency, without commission. He further represented that the stock was worth $200 a share and that the Lion Bonding & Surety Company paid 6 per cent. dividends quarterly thereon; that the company was protected by the state guaranty fund, the same as state banks; that the stock cost the Bankers Sales Agency $200 a share and was being sold without commission through the banks of the state; that all money invested in stock would be refunded to purchasers on 30 days' notice; that said statements were false, and in reliance upon the same defendant purchased 50 shares of said stock and gave four notes in payment in the sum of $2,500 each, due six months after date, payable to C. E. Negus. Two notes were sold to a bank at Arlington, and subsequently paid by defendant, and the other two were renewed from time to time in the name of C. E. Negus and are the two involved in this suit.

Plaintiff receiver contends that the First Bank of Nickerson purchased the original notes in question from C. E. Negus on July 19, 1918, for value, in the regular course

of business, and without notice of defenses or infirmities therein, and has always been the owner of the renewals, including the ones here in suit; and further contends that defendant is estopped to make a defense in this action by reason of having previously elected to bring an action in damages against the Bankers Sales Agency, C. E. Negus and W. A. Taylor, in the district court for Douglas county, Nebraska, which suit is still pending.

Fraud in the inception of the notes was proved, and the only question for determination is whether there was sufficient evidence to go to the jury as to whether or not plaintiff bank was a holder in due course. The question to be determined is: Was the knowledge of Negus, the cashier, imputed to the bank when he sold his own notes to the bank, thus acting for himself as seller and also for the bank as purchaser?

The original notes were not indorsed to the bank by Negus on Juy 19, 1918. A certificate of deposit was made out stating that "Herman C. Ruwe has deposited in this bank twenty-five hundred dollars, payable to the order of Bankers Sales Agency." Negus' name nowhere appears in the transaction on the banks books. When the notes come due Negus each time personally secured renewals in his own name, and defendant had no knowledge that the bank was claiming any interest in the notes, or that the representations of its cashier were false, until after the last renewal was given.

The rule is well established that knowledge of an officer of a bank, acquired while acting beyond the scope of his authority, is not imputed to the bank, and this is especially true when the agent is engaged in an independent fraudulent scheme. But we have a different situation in the present case. Here the bank is seeking to enforce a contract made by its cashier, who was its sole managing officer, and which was later purchased from said officer by the bank. As cashier it was the duty of Negus to pass upon all paper and the discounting of all notes. When he dealt with himself there was none other to communicate with,

nor any one from whom knowledge could be concealed. What he knew as an individual he was also bound to know as cashier. Where an officer is acting both for himself as an individual and as manager of a banking corporation, in the purchase of a note from himself by the bank, and his action in that behalf is adopted by the bank, his knowledge as a man is equally his knowledge as cashier. *First Nat. Bank v. Erickson,* 20 Neb. 580; *State v. American State Bank,* 108 Neb. 92; Id. 108 Neb. 111; Id. 108 Neb. 119; Id. 108 Neb. 129; *First Nat. Bank v. Burns,* 88 Ohio St. 434; 49 L. R. A. n. s. 764; *Farmers & Merchants State Bank v. Kohler,* 159 Minn. 35; *Louisa County Nat. Bank v. Burr,* 198 Ia. 4; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270.

Claim is made by appellee herein that Anderson, assistant cashier, transacted the business in the purchase of the notes and Negus only acted for himself as seller. We do not think this position is tenable. Negus was the superior officer, whose duty it was to discount paper or purchase notes. In transactions where he was present, he cannot be superseded in authority by an inferior officer. What Anderson did was merely under the direction of Negus. *State v. American State Bank,* 108 Neb. 129. To say that Negus stepped aside in his duties as cashier while the notes were being purchased would be to create sufficient suspicion to put the assistant cashier on inquiry as to any defenses which might be raised against the notes.

The filing of a suit against other parties by the defendant to recover damages caused by their deceit in selling the stock in question is not such an election of remedies as will prevent the defendant herein from setting up a defense of want of consideration and fraud when sued upon the notes thus secured. The actions are between different parties and the defendant had paid two of the notes which are not involved in this action. The positions are not inconsistent. 20 C. J. 8; *Zimmern v. Blount,* 238 Fed. 740.

The case should have been submitted to the jury and the

court erred in directing a verdict for the plaintiff. The judgment is

REVERSED.

HATTIE REID, APPELLEE, V. JOSEPH J. BRECHET ET AL., APPELLANTS.

FILED JULY 6, 1928. No. 26142.

1. **Appeal**: INSTRUCTIONS: MATTERS NOT IN ISSUE. "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants." *Citizens Nat. Bank v. Sporn*, 115 Neb. 875.
2. **Pleading and Proof**. The record discloses no evidence supporting the allegations of the petition indicating a conspiracy to defraud.
3. **Trial**: DIRECTION OF VERDICT. In a law action to recover damages growing out of a conspiracy to defraud, and such being the only issue tendered by the pleadings, the evidence of such conspiracy being insufficient to justify the trial court in submitting the case to the jury, it is error to submit the case to the jury on the theory of liability growing out of partnership relation.
4. ——: ———. In an action to recover damages based upon a conspiracy to defraud, there being no evidence of such conspiracy, and upon motion therefor, it is the duty of the trial court to direct a verdict for the defendants, and a refusal to do so constitutes error.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

William Baird & Sons, for appellants.

John A. McKenzie, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE and REDICK, District Judges.

CHASE, District Judge.

This is an action brought by Hattie Reid against Joseph J. Brechet, C. Dean Glover and W. Gayle Spain, as individ-

uals, to recover damages growing out of an alleged conspiracy to defraud the plaintiff in the exchanging of lot 1, block 7, Hanscom Park Place, an addition to the city of Omaha, Douglas county, Nebraska, for property of the plaintiff located in Minneapolis, Minnesota. Joseph J. Brechet, who appears to be a resident of Minnesota, was not served with process and the trial court dismissed the action as to him. At the close of plaintiff's testimony the defendants and each of them moved for a directed verdict in their favor, which was denied by the trial court. The case then proceeded to further trial, was submitted to the jury, and the jury returned a verdict for the plaintiff, assessing her recovery in the sum of $3,700, whereupon appellants filed a motion for new trial, alleging numerous errors occurring at the trial, which motion was overruled.

The appellants in their brief rely upon nine separate assignments of error for reversal of the case. There is substantially the same principle involved in the first three assignments of error and they may be considered in conjunction in the disposition of the case.

The appellants' contention in this regard is that there was a fatal variance between the pleadings and the proof, in that the pleadings and the theory upon which the plaintiff relied for her recovery is based upon an alleged conspiracy to defraud her in the exchange of property, while the proof is wholly lacking as to any conspiracy having existed; but, if sufficient to support a verdict, must be upon the theory that W. Gayle Spain and C. Dean Glover were partners in the general real estate business located in the city of Omaha, Nebraska, and that Bayles Spain, the party with whom the plaintiff had practically all the negotiations in the transaction complained of, was the agent of the copartnership and represented it in the transaction had with the plaintiff.

In order to determine this question, it is first necessary to resort to the pleadings to ascertain the nature and theory of the action under which plaintiff seeks recovery. The first paragraph of plaintiff's petition is as follows:

"That on or about the 1st day of August, 1926, the defendants, and each of them, entered into a plan, scheme and conspiracy to cheat and defraud the plaintiff out of a large sum of money; that pursuant to said plan, scheme and conspiracy, the defendants, and each of them, sought to sell, convey and turn over to the plaintiff the property known as lot one (1), block seven (7), Hanscom Place, an addition to the city of Omaha, Nebraska, at a valuation greatly in excess of its real and true value."

The remainder of the petition sets forth elaborately and in detail a long list of alleged misrepresentations of fact concerning the quality of the property sought to be exchanged, its repair and general condition, upon which the plaintiff relied in closing the transaction. Nowhere in said petition does it appear, nor is there an allegation of a partnership relation existing between these two defendants, nor is it alleged in the petition that the said Bayles Spain ever made any representations whatever, but all of the misrepresentations complained of in the petition are alleged to have been committed by the two defendants C. Dean Glover and W. Gayle Spain.

The defendants' answer to the petition for all practical purposes may be considered a general denial in that it denies the alleged conspiracy and does not admit any partnership relation or agency existing between these defendants and Bayles Spain.

The reply is a general denial of all statements in the answer except such as are admitting the facts in the petition.

From the pleadings this action must be considered one in tort growing out of a conspiracy. So far as the evidence of fraud is concerned, reflected by the record, we are unable to find a syllable of testimony substantiating the allegations of the petition concerning the existence of any conspiracy. By the testimony of the plaintiff it appears that she never had any conversation whatever with the defendant W. Gayle Spain concerning the transaction, neither did she have any conversation whatever with the defendant C.

Dean Glover concerning the transaction, until after the contract of purchase had been entered into by her; that all of her negotiations up to the time of the execution of said contract had been with one Bayles Spain, who was not a member of the real estate firm.

In the testimony of Bayles Spain he states that he is a brother of W. Gayle Spain and that the defendants are partners in the real estate business, and by the testimony of the defendant Glover, by way of preliminary explanation of his relationship to the case, he testifies that he is a partner in the real estate business with W. Gayle Spain. The case was submitted to the jury on the theory of a partnership relation existing between these defendants, and not on the theory of a conspiracy. At the close of the evidence, which, if it established anything, established a partnership relation existing between the defendants and that Bayles Spain was the agent of the partners, the plaintiff did not move the court to permit her to amend the pleadings to conform to the proof, but depended upon the record as it stood to support her recovery in the action.

In order to dispose of this question logically, it will be necessary to analyze the distinction which exists between actions based upon conspiracy and actions upon liability growing out of partnership relations. " 'Civil conspiracy' is a combination of two or more persons to accomplish, by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means." *National Fireproofing Co. v. Mason Builders Ass'n*, 169 Fed. 259, 26 L. R. A. n. s. 148. While it is not necessary for a recovery in an action based upon a conspiracy to join all of the conspirators, the theory of the law is that they are joint tortfeasors, and that any one or all are liable for any injury resulting from such conspiracy; so that in the present action it was not necessary for the plaintiff to join Bayles Spain with the defendants upon the theory of conspiracy, but it was necessary to support the allegations of the petition by facts amounting to a conspiracy resulting therefrom in

order to have the case submitted to the jury upon the theory of the pleadings.

An action of conspiracy sounds essentially in tort. An action against copartners for fraud committed by their agent, while in tort, yet the general liability grows out of a contractual relationship existing between the copartners. The principle element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire. On the other hand, copartners may become jointly and severally liable to an injured party for fraud committed by their agent, even though they may have no knowledge whatever of the misrepresentations or the transactions, if done by their duly authorized agent while acting within the scope of his authority. The liability grows out of the contractual relationship of the parties, and for that reason the misconduct of the agent is legally imputable to his principals. In other words, if the members of the firm set in motion the agency that perpetrates the fraud, they are liable to the injured party, notwithstanding they were without knowledge that a wrong was inflicted, while actions for conspiracy, in theory of law, proceed upon a very different principle. This court in the recent case of *Citizens Nat. Bank v. Sporn,* 115 Neb. 875, laid down this rule: "Generally, it is error for the trial court, by its instructions, to submit to the jury an issue not raised by the pleadings, if the submission of such issue is likely to prejudice the rights of one of the litigants."

The trial court in giving instruction No. 1 stated in part as follows:

"So that the only persons whose liability you have to consider is that of the defendant Glover and the defendant W. Gayle Spain, who, it is admitted, were partners in the real estate business when the exchange of the plaintiff's property for the Omaha property was effected."

Instruction No. 5, given by the trial court, is as follows:

"As already stated, this action is based upon alleged false and fraudulent representations made by the defendants, or by Bayles Spain who was in the employ of the other defendants, and whose representations, if any were made by him, would be binding upon the defendants."

Instruction No. 7, given by the trial court, is as follows:

"If you find that the defendants, or their agent, or employee, made any representations to the plaintiff during the negotiations which finally resulted in her purchase of the property in the first days of October, 1926, and that the plaintiff relied upon such representations, and that by any statement or act of the defendants she was influenced or dissuaded or in any way prevented from inspecting the premises prior to her purchase, in October, you are instructed that in such case she would be justified in relying upon any such representations, and in purchasing the property without actually inspecting it; and if under these circumstances you find any such representations to have been false, the defendants would be liable for any damages resulting from any such false representations."

An interpretation of these instructions convinced us that this case was submitted to the jury upon the theory of a partnership relation existing between these two defendants, and upon the theory that their liability, if any, grew out of the fact that Bayles Spain was their agent. We find no case where conspirators can commit acts by agents, as a conspiracy, in itself, is an unlawful arrangement, and, being such, it is very doubtful whether it, or any member of it, could employ an agent to carry out and perpetrate its unlawful design. There can be no doubt that a partnership, or each individual member, may be liable for fraud committed by any one of its members or by its agents, but in order to recover upon the theory of partnership relation it is necessary to allege such partner-

ship relation to base a recovery thereon. The function of the pleadings is to state the issues involved and the facts upon which the parties rely for their success in the action. Certainly the defendants in this case would have a right to know upon what theory the plaintiff was going to proceed and a right to rely upon plaintiff's statement of the case in order that the defendants might meet the plaintiff's evidence. The evidence must support the allegations in the petition or judgment in plaintiff's favor cannot be sustained. *Traver v. Shaefle,* 33 Neb. 531; *Elliott v. Carter White-Lead Co.,* 53 Neb. 458. Certainly the defendants were misled by proof of a relationship upon which a liability was sought different from that set forth in the pleadings, and, being misled, the action of the trial court in submitting the case to the jury on a different state of facts than those disclosed by the pleadings was prejudicial to the rights of the defendants. The whole case seems to have been tried below on the theory of liability growing out of partnership relation, while the pleadings allege an action in conspiracy. We are unable to find where this particular proposition is discussed by the appellee in her brief and we find no cases cited asserting a contrary doctrine. From an examination of the record, we reach the conclusion that the trial court, not only committed error in refusing to sustain a motion to direct a verdict for the defendants, but also in the submission of the case to the jury upon its merits on the theory of partnership liability.

It would serve no purpose to discuss further the other propositions relied upon for reversal in this case as the one herein discussed fully disposes of the whole matter.

REVERSED AND REMANDED.

The following opinion on motion for rehearing was filed September 19, 1928. *Rehearing denied.*

PER CURIAM.

The opinion in this case was adopted on the 6th day of July, 1928, and is reported, *ante,* p. 411. The attorney

for appellee was furnished with the record in the case by the clerk of this court on the 13th day of July, 1928. The motion for a rehearing was filed on the 7th day of August, 1928, but up until the present time, to wit, September 11, 1928, the record has not been returned by appellee's attorney. It is provided by rule 17 (c) of this court, as follows: "If the party filing the motion for rehearing withholds the record for a period of five days from the filing of the motion, the motion will be denied as of course." The foregoing rule becomes a material part of a proceeding in this court to which it applies.

REHEARING DENIED.

WILLIAM H. EMEL, ADMINISTRATOR, APPELLEE, V. STANDARD OIL COMPANY, APPELLANT.

FILED JULY 6, 1928. No. 26332.

1. **Limitation of Actions:** PLEADING: AMENDMENT. The amendment to the petition set forth in the opinion *held* to introduce a new cause of action, barred by the statute of limitations, and the allowance of such amendment is erroneous.
2. **Negligence:** INSTRUCTIONS. An instruction on the law of comparative negligence that informs the jury that, "if you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should in either event return a verdict for the defendant," *held*, under the facts and circumstances, not erroneous, but criticized as not being as full a statement of the law of comparative negligence as the defendant was entitled to have submitted to the jury.
3. **Damages:** INSTRUCTIONS. An instruction informing the jury that, in arriving at the measure of damages in a personal injury suit, they may take into consideration the need of assistance on the part of the person or persons to be benefited by a favorable verdict, *held* to be erroneous.
4. **Evidence** examined, and *held* insufficient to support a verdict for the plaintiff.

APPEAL from the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Reversed and dismissed.*

W. H. Herdman and *C. P. Anderbery,* for appellant.

E. B. Perry and *King & Bracken, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, and HOWELL, JJ., and PROUDFIT and REDICK, District Judges.

PROUDFIT, District Judge.

This is an action brought by the administrator of a decedent, who sues to recover damages alleged to have been sustained by the death of plaintiff's intestate, and is its second appearance in this court. At the former hearing the case was argued before division No. 2 of the supreme court commission, a judgment of reversal resulting therefrom. After the filing of the opinion by the commission, the plaintiff sought leave to amend his petition in this court and leave so to do was denied. The case was remanded to the district court for further proceedings. Upon the second trial of the action in the district court leave was obtained to amend paragraph 4 of the petition over the objection of the defendant. Paragraph 4 of the original petition alleged:

"That on the 28th day of August, 1922, said Robert Blackburn, while so in the employ of defendant, and while driving said oil truck loaded with oil and gas, again carelessly, negligently and wrongfully invited and permitted the said Johnson A. Emel to enter upon said truck, as had been his custom, for the purpose of accompanying him on a trip distributing oil and gas; that at said time the said Johnson A. Emel, without fault or negligence on his part, fell from said truck to the ground and the wheels of said truck passed over his body, and on account thereof he sustained an injury from the effects of which he died on said same day."

Said paragraph 4 as amended alleges: "That on said 28th day of August, 1922, said Robert Blackburn, while so in the employ of defendant, and while driving said oil truck loaded with oil and gas, again carelessly, negligently and wrongfully invited and permitted said Johnson A.

Emel to enter and ride upon said truck, as had been his custom, for the purpose of accompanying him on a trip distributing oil and gas; that defendant, by its employees and servants, after having invited plaintiff's decedent to ride on defendant's said truck, and while well knowing that said child intended to and was about to take hold of and mount said moving truck, thus having ample time, failed to bring said truck to a stop and failed to warn deceased not to attempt to mount said truck, although there was ample time to do so after defendant discovered, or in the exercise of reasonable care should and would have discovered, the presence of said child and his intentions in regard to mounting said truck, but defendant in fact, suddenly, without warning to said child, and while said child still believed his presence was desired by the defendant on said truck, suddenly, wantonly, wilfully and negligently turned and swerved said truck to the north and away from said child and thereby said child missed his hold on said truck and his footing thereon, fell under said moving truck so negligently driven and managed as hereinbefore alleged, and thereby as a result of defendant's negligence said child received injuries of which he died."

The injury of which plaintiff complains occurred on the 28th day of August, 1922. The original petition was filed June 27, 1924, and the amended petition was filed April 15, 1927, and when the amendment was permitted, the defendant objected thereto for the reason that said amended petition stated a new cause of action and was a departure from the original cause of action as pleaded in the original petition, and at the time the amendment was permitted was barred by the statute of limitations. This objection was overruled and the amendment permitted. The second trial of the case resulted in a verdict and judgment for the plaintiff, and a motion for new trial was filed by defendant and overruled.

From the overruling of said motion the defendant prosecutes an appeal to this court, alleging numerous errors in the proceedings had in the trial court. The errors com-

plained of and argued in brief by counsel are: (1) The court erred in overruling defendant's motion for an instructed verdict; (2) the court erred in giving instruction No. 6 to the jury; (3) the court erred in giving instruction No. 12 to the jury; and (4) the court erred in permitting plaintiff to amend his petition, in that said amendment introduced a new cause of action, which was barred by the statute of limitations.

The errors complained of will be discussed in inverse order. Did the court err in permitting plaintiff to amend his petition? If the amendment introduced a new cause of action, then it should not have been permitted, as the statute provides: "Every such action shall be commenced within two years after the death of such person." Comp. St. 1922, sec. 1383. A cause of action must be distinguished from the subject of the action. It is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other. It embraces all the facts which, taken together, are necessary to fix the responsibility. It does not consist in either a duty or obligation, or a failure to discharge that duty, or injury standing alone, but all three of these elements must be combined to give rise to a cause of action. *Westover v. Hoover*, 94 Neb. 596. In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 256, it is held: "A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged." And in the discussion of the *Johnson* case, at page 258, it is said: "A cause of action in any case embraces, not only the injury which the complaining party has received, but it includes more. All the facts which, taken together, are necessary to fix responsibility, are parts of the cause of action." Such being the rule established in this jurisdiction, it would appear that error was committed in permitting the petition to be amended.

Instruction No. 6 informs the jury: "If you find from

the evidence that the defendant was guilty of negligence, you will then determine from the evidence whether the deceased was guilty of negligence. If you find that both were negligent, then it is your duty to fix the degree of the deceased's negligence as compared with that of the defendant. If you find from the evidence that each was guilty of an equal degree of negligence, or that the negligence of the deceased was greater than that of the defendant, then you should in either event return a verdict for the defendant. If, however, you find from the evidence that the defendant's negligence was gross and the deceased's negligence was slight, then the slight negligence of the deceased would not defeat his recovery in this action, but in making up your verdict you should consider such contributory negligence of the deceased in mitigation of the damages in proportion to the amount of the contributory negligence attributable to the deceased when compared to the combined negligence of the deceased and defendant."

This instruction, taken as a whole, cannot be said to be a misstatement of the law of comparative negligence. However, it may be criticized as not being as full a statement of the law as the defendant was entitled to have submitted to the jury. It cannot be questioned that, if the negligence of the decedent was equal to or greater than that of the defendant, the plaintiff would not be permitted to recover, but the instruction may justly be challenged as to this portion, in that it apparently leaves the question of negligence in such condition that the jury would be justified in concluding that, if the negligence of the decedent did not equal or exceed that of the defendant, then the plaintiff would be entitled to recover; whereas, the rule is that if, in comparing the negligence of the parties, the contributory negligence of the plaintiff (decedent in this case) is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory neg-

ligence of plaintiff (decedent in this case), however slight, will defeat a recovery. *Morrison v. Scotts Bluff County*, 104 Neb. 254. And the defendant was therefore entitled to have the instruction on comparative negligence submitted in this form. Instruction Number 6, therefore, while it cannot be said to be a misstatement of the law, may properly be criticized as not being a full and accurate statement of the law of comparative negligence as heretofore laid down by this court. It may well be said in passing that the opinion of this court in *Morrison v. Scotts Bluff County, supra*, affords trial courts a safe guide for instructing on the rule of comparative negligence.

Counsel for defendant complains of instruction No. 12 as being contradictory and in conflict with instruction No. 6. The conflict between these two instructions, if any, need not be considered, for the reason that there is a more serious error than that in instruction No. 12. In this instruction the jury are informed that, if they find that the plaintiff is entitled to recover, their attention must then be turned to the measure of damages, "and, in arriving at such amount, you should take into consideration the expectancy of life of each of the parents and their probable need of assistance in the future." The writer knows of no case in the books that permits the need of assistance to be a measure of damages, and the presumption is that the need of the parents in this case might have been a powerful factor in influencing the jury to arrive at the verdict they did. This instruction in itself would be sufficient to call for a reversal of the case.

A careful review of the evidence in this case convinces the court that no actionable negligence was proved against the defendant, and, as negligence can never be presumed, but must always be proved, it necessarily follows that a verdict should have been directed for the defendant. The judgment of the trial court herein is reversed and the action dismissed.

REVERSED AND DISMISSED.

WILLIAM MORROW ET AL., APPELLEES, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

FILED JULY 6, 1928. No. 26312.

1. **Waters: IRRIGATION DISTRICTS: TAXES: REFUND.** Section 2878, Comp. St. 1922, providing for refund of taxes paid under protest is a cumulative remedy in cases brought within its terms, and is therefore not excluded by sections 2865 and 2904, Comp. St. 1922, providing for the exclusion of lands from an irrigation district.
2. **Taxation: ILLEGAL LEVY: REMEDY.** The remedy by appeal from the decision of the board of equalization is exclusive as to all questions properly before them, such as the valuation of lands for assessment and the comparison of values of the several tracts; but where certain land is not subject to taxation, the remedy by payment under protest and claim for refund is applicable.
3. **Waters: IRRIGATION DISTRICTS: TAXATION: SUBIRRIGATED LANDS.** A statute provided that taxes levied upon lands by an irrigation district, if paid under protest, should be refunded if it were shown "that the lands could not be benefited by irrigation, * * * by reason of subirrigation." *Held*, that the term "subirrigation" as used in that connection cannot be interpreted to mean only lands subirrigated to the extent that they have become unfit for cultivation, but that the true test is whether or not such lands can be benefited by irrigation; that is, by the application of water to the surface thereof.
4. ——: ——: ——: ——. Lands properly included in an irrigation district when organized, which subsequently, by reason of seepage or percolation through the soil of waters from the canal of the district and the spreading thereof upon surrounding lands, have become subirrigated to such an extent that they cannot be benefited by irrigation, are not subject to taxation by said district for the payment of the operating expenses thereof.
5. **Question not Decided.** Whether said lands may be taxed to pay principal and interest of bonds issued by the district is not presented nor decided.

APPEAL from the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Raymond & Fitzgerald, for appellant.

Morrow & Morrow, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and CHASE, REDICK and WHEELER, District Judges.

REDICK, District Judge.

Action to recover from an irrigation district the amount of an assessment paid under protest. Plaintiff had judgment in the district court, and the district appeals. The facts are not in dispute. The Farmers Irrigation District was duly organized in 1897, embracing in its boundaries the lands now owned by plaintiff, described as the east half of the northeast quarter of section 3, in Scotts Bluff county, and approximately 60,000 acres additional. At and prior to the organization of the district the lands of plaintiff were arid and could at said time be benefited by the application of irrigation water on the surface thereof, and were not capable of producing profitable crops without such irrigation. The canal of defendant was constructed above said land in 1909, and thereafter irrigation water was applied upon the surface of said premises. A few years after the application of the irrigation water upon the lands in the vicinity of said premises and including the same, part of the latter, which was lower than the adjacent land, became wet by reason of the irrigation of adjacent lands by the process of percolation. Plaintiff became the owner of the premises March 1, 1920, at which time the north half thereof required irrigation from defendant's canal, but all of the south half, except about three acres in the southwest corner thereof, was too wet for raising crops, and water stood on the surface of about 25 acres. In 1920 defendant constructed a drain across the east half of the northeast quarter, whereby about 20 acres of the southeast quarter of the northeast quarter was relieved of surface water so that it could be profitably cropped without the application of irrigation water on its surface. In 1923 the drain above mentioned was deepened and another one constructed whereby all the

surface water on the southeast quarter of the northeast quarter was removed, and thereafter, under adequate irrigation, crops could be raised on 23 acres, but 20 acres continued to be too wet for that purpose. Only 3 acres of said 23 acres on which crops could be grown could be benefited by the application of water upon the surface thereof, and the remaining 20 acres could not be benefited, but the application of water upon the surface would be injurious, in the year 1925. The reason why the 20 acres, the assessment of which is in controversy herein, could not be benefited by surface irrigation was that the same had become subirrigated by reason of seepage resulting from the application of water from defendant's canal upon adjacent land in the district to such an extent that sufficient moisture for the raising of crops existed.

In 1925 the district assessed that portion of the northeast quarter which was too wet to raise crops at the nominal value of $1 an acre, and the 23 acres at $50 an acre, which included the 20 acres which had become subirrigated, the tax upon which is the matter in dispute, amounting to $100. Before the levy of the taxes they were equalized by the board of equalization, and all proceedings prior to the levy were regular. The plaintiff did not appear before the board and make any objections to the taxes in question, but paid the same under protest, and filed his claim with the board for refund, which was disallowed. Upon appeal to the district court plaintiff recovered a judgment against the district for the sum of $113.35, to draw interest at 10 per cent. per annum.

Two questions are presented for our consideration: First, whether this is a proper proceeding; and second, whether the 20 acres of subirrigated land are subject to taxation by the district. Of these in their order.

1. The defendant contends, in the first place, that plaintiff should have proceeded by application to the board of the district to exclude therefrom the 20 acres in question, for which proceeding provision is made in the statute;

and, in the second place, that he should have appeared before the board of equalization and made his objections to the assessment, and appealed from an adverse decision to the district court; the contention being that by failure to follow one of these remedies he is precluded from attacking the validity of the assessment. However, in 1903 the law governing irrigation districts was amended and said amendment is now known as section 2878, Comp. St. 1922, whereby it was provided that when any person against whose property assessments have been made shall pay said assessments under protest as provided by the general revenue act, the board was authorized to refund the same, and contained the following proviso:

"Provided, however, that no taxes or assessments shall be ordered refunded unless the person complaining shall file in the office of the secretary of such district a copy of his tax receipt, showing the same paid under protest, together with a sworn affidavit in writing showing one of the following reasons why such tax or assessment should be refunded:

"First. That the land upon which such tax or assessment was levied is not within the boundaries of the district for which such lands were taxed, or assessed.

"Second. That the title to said lands are in the state of Nebraska.

"Third. That the lands could not be benefited by irrigation, either by reason of subirrigation * * * or that the lands are nonsusceptible of irrigation from the canal of the district."

All formal requisites of this section were complied with by plaintiff. No doubt all objections which might properly have been submitted to the board of equalization, such as the valuation of the property and the relative amount thereof as compared with other property in the district, would be foreclosed by failure of plaintiff to appear (*State v. American State Bank*, 114 Neb. 740); but the general revenue act provides for payment under protest and refund in all cases where the property was not

liable to taxation or assessment, which is the claim of plaintiff here. We think the section under consideration was a special provision covering all cases within its terms, is cumulative, and the two other remedies suggested are not exclusive, as applied to the question here presented. We have not overlooked the case of *Sowerwine v. Central Irrigation District,* 85 Neb. 687, in which it was held that for the purpose of excluding lands from the district the statutory procedure is the exclusive remedy, and that a suit in equity will not lie (see, also, *Andrews v. Lillian Irrigation District,* 66 Neb. 461); but the present case is not for that purpose and will not accomplish that result.

2. Were the 20 acres of subirrigated land subject to taxation by the district? The answer depends very largely upon the construction of the third section of the proviso above quoted, to wit: "That the lands could not be benefited by irrigation, either by reason of subirrigation * * * or that the lands are nonsusceptible of irrigation from the canal of the district." This section clearly requires the claimant, as the condition of refund of taxes, to show that the lands could not be benefited by irrigation; and he is confined to two reasons whereby that fact may be established: (1) Because the lands are already supplied with sufficient moisture by subirrigation and do not require the application of water from the irrigation canal; and (2) that the lands are not susceptible of irrigation from the canal of said district. With the second reason we are not concerned. We think the word "susceptible" is used in the sense of capable, and was intended to refer to lands which, for some cause, could not make use of waters from the canal. The first reason furnishes the principal ground of argument. It is conceded that, from arid lands upon which no crops could be raised, the lands in question have been converted into arable lands in consequence of their subirrigation from the waters of the canal of the district and the distribution thereof over adjoining lands, and the district contends that, inasmuch as they have thereby received special benefits from the operations of the dis-

trict, they should pay therefor in the form of special taxes. On general principles of justice this contention is of great force, but as the only authority to levy taxes and assessments comes from the legislature, warrant for such levy must be found in the statute. The object of organizing irrigation districts is to gather the waters arising therein and distribute the same over lands requiring it because of the insufficiency of normal rainfall, and the basis for taxing such lands is found in the special benefits which they so receive. If for any reason growing out of natural causes a particular tract of land does not require additional water to be artificially provided, or is in such a location that water cannot be conducted to it by artificial means, then it cannot be said to be benefited by irrigation.

It would appear to be perfectly plain that by section 3 the legislature intended to provide for these two situations, which can be demonstrated by a permissible reconstruction of said section as follows: "That the lands could not be benefited by irrigation because they are already subirrigated," or "are not susceptible of irrigation." As applied to agriculture, irrigation is defined by Webster as "The supplying of water by canals, ditches, etc.; the operation of causing water to flow over land for nourishing plants;" and to subirrigate is "to irrigate below the surface, as by a system of underground porous pipes."

By the language used the evident intent of the legislature was to distinguish between the terms irrigation and subirrigation, using the word irrigation in its ordinary accepted sense of spreading water upon the surface of the land by artificial means, and subirrigation as a natural process by percolation through the soil. Section 2865, Comp. St. 1922, provides for the apportionment of water to the lands in the district, and continues: "Provided, if the tract of land, or any part thereof, to which such water right attaches shall at any time become subirrigated to the extent that water is no longer of any benefit thereon for irrigation purposes," the owner may make application to have the same excluded from the district by releasing

his water right and having it applied to other lands. Thus the legislature declared its intention that such lands should no longer be charged with the expense of operating the canals when they had no use for the waters thereof. Again, by providing for the recovery by the landowner of taxes paid under protest upon subirrigated lands, the legislature clearly intended that such lands should not be taxable by the district. Whether this is fair, just, or in consonance with sound public policy is a question for the legislature, and not for the courts. An illustration will make it clear that no power exists in the district to tax the lands in question: Suppose the organization of an irrigation district with boundaries fixed by it; the limit of taxation is within the boundaries so established. After the operation of the district for a number of years the lands adjoining the same (by means of the operation by the district of its canals and the spreading of the water upon the surface of the lands in the district, by the process of seepage or percolation) become subirrigated so that they may be properly utilized for the raising of crops, whereas prior to the operations of the district they were arid and incapable of such use; they would undoubtedly receive a special benefit from the waters of the irrigation district, but no one, we think, would claim that the district had authority to levy assessments upon such lands because of such benefits, for the simple reason that the legislature had not authorized them so to do. By the same reasoning, the test being whether the lands may be benefited by irrigation, and the legislature having declared that lands merely subirrigated are not liable to tax, the mere fact that they are within the district is not sufficient to authorize the tax.

The district further contends that the lands in question are subject to assessment to pay the cost of drainage canals, but the present tax was not levied for that purpose. Also, that the subirrigation referred to means only such as arises from natural causes. The causes here operating —seepage and percolation—might well be deemed natural

causes, although contributed to by the district operations, but the statute imposes no such limitation. Further, that the inclusion of the lands in the district at the time it was organized was a final determination that the lands would be benefited by irrigation, citing *Sowerwine v. Central Irrigation District*, 85 Neb. 687. The statute, however, has anticipated and provided for a change in the situation by provisions for excluding subirrigated lands from the district and refund of taxes thereon paid under protest. It is further argued that the word "subirrigation" should be construed as embracing only lands which have become subirrigated to the extent that they are unfit for cultivation. The words of the statute do not permit such qualification of the term; in fact, the only test provided is that they "could not be benefited by irrigation."

We conclude that the judgment of the district court is right and should be affirmed.

AFFIRMED.

HELEN SVOBODA, APPELLEE, V. SNYDER STATE BANK, APPELLANT.

FILED JULY 6, 1928. No. 26488.

1. **Banks and Banking: INSOLVENCY: GUARANTY FUND COMMISSION: DISSOLUTION.** The taking over of the assets of a banking corporation by the department of trade and commerce of this state for the purpose of managing or liquidating such bank does not effect a dissolution of the corporation.
2. ———: ———: ———: ACTION. In such case, the corporation retains its corporate entity and is subject to suit upon its contracts, with this qualification, that by such suits it is not sought to interfere with the possession of the assets of the bank or the distribution thereof.
3. ———: ———: ———: ———. An action against a banking corporation, which has been taken over by the department of trade and commerce, and the business of which as a going concern is being carried on by the guaranty fund commission, to recover a judgment upon a certificate of deposit issued by said bank while so conducted by the commission is not in form or

effect a suit against the state requiring its consent to its institution.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

C. M. Skiles and *I. D. Beynon,* for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE and REDICK, District Judges.

REDICK, District Judge.

This is an action brought by the plaintiff against the Snyder State Bank of Snyder, Nebraska, to recover upon a certificate of deposit issued by said bank on April 29, 1926, for $500, due in 12 months thereafter, with interest at 4 per cent. per annum, no interest after maturity. The certificate became due April 29, 1927, and was presented for payment and payment refused; whereupon this suit was brought September 1, 1927. The bank appeared by the guaranty fund commission of the state of Nebraska and moved to dismiss the case upon the ground that the action was one against the state of Nebraska, and that the assets of said bank are in possession of the guaranty fund commission. The motion was overruled and an answer presenting substantially the same matter as defense was filed for the bank by the guaranty fund commission. Thereafter plaintiff filed a motion for judgment on the pleadings, which was sustained and judgment rendered for plaintiff in the sum of $547 and costs. The defendant appeals, making seven assignments of error, all of which may be included in the fourth assignment, that the judgment is contrary to law.

No defense was presented to the merits of plaintiff's claim, and the sole question for determination is whether or not the action is in effect one against the state of Nebraska which cannot be maintained without the consent of the state.

It appears from the record that on March 20, 1925, the department of trade and commerce took possession of the bank and all its assets, and turned the same over to the guaranty fund commission of the state for administration and management, under section 8029, Comp. St. 1922, as amended by section 11, ch. 191, Laws 1923, as amended by section 1, ch. 30, Laws 1925. This last act provided: The department of trade and commerce "may forthwith take possession of the property and business of such bank, and place it in charge of the guaranty fund commission, who shall thereafter conduct the affairs of said bank, and who shall retain possession of all money, rights, credits, assets and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law. Any attachment lien against such property, acquired within thirty days next preceding the taking of such possession, shall be thereby released and dissolved."

Section 4 of the act of 1925 is as follows: "Upon taking possession of the property and business of any bank, the guaranty fund commission may take charge and control of the property and business of such bank and open it and manage it as a going concern, without regard to its solvency, and through employees perform all duties and acts of the officers and directors of such bank while managing the same, and all salaries and expenses in connection therewith shall be paid by the bank. The operation of the bank by the guaranty fund commission shall in no manner relieve or diminish the obligations of the stockholders under the laws of this state, or in any manner absolve the owners of such stock or the officers or directors of any liability under the civil or criminal laws of the state. If the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then the commission shall proceed to liquidate such

bank as by law provided: Provided, the district court of the district in which such bank is located may, upon application of any judgment creditor after a period of three months from the taking over of said bank by the guaranty fund commission, order the commission to close said bank, and liquidate the same, as provided by law."

When the guaranty fund commission took possession of defendant bank, March 20, 1925, in pursuance of the authority granted by section 4, above quoted, it opened the bank for business, received deposits, paid checks, and conducted the bank as a going concern from that time forward, and managed the same in substitution for the regular officers of the bank. On April 29, 1926, it received from plaintiff the sum of $500 on deposit, and issued its certificate as above stated. No receiver has ever been applied for or appointed to take charge of the assets of the bank and liquidate its affairs. The guaranty fund commission continues to operate it as a going concern in the hope and expectation that it will be able to get the affairs of the bank in such condition that they may turn the same over to its stockholders and directors and thus enable them to continue the business of the bank under the supervision of the state in the same manner as such business was conducted prior to the intervention of the department of trade and commerce. If, after having taken possession, at any time the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then it is required to notify such fact to the attorney general, whose duty it is to apply to the courts for the appointment of a receiver of the bank for the purpose of liquidating its assets and winding up its business. Laws 1925, ch. 30, sec. 5.

A relevant question is: What is the status of the bank during the period for which its business is conducted by the guaranty fund commission as a going concern? Is it dead, dormant, or a living banking institution having all the privileges and subject to all the liabilities of such a concern? The corporation is not dead, because the hold-

ing is practically universal that, though insolvent and in the hands of a receiver, the corporate entity is not destroyed. 14A C. J. 977, sec. 3217. And the mere taking over of possession by the guaranty fund commission is much less effective than the appointment of a receiver, because the commission has no power to liquidate its assets—that has to be accomplished by the appointment of a receiver to whom the commission is required to deliver. It is not dormant, because the corporation still maintains its entity, with all its powers except the management and control of its property, and except, of course, the power to do any act which would interfere with the possession of the receiver, or the commission in the performance of duties enjoined by law. It may hold corporate meetings, elect officers, appoint committees, and perform other acts for the benefit of the corporation, within the limits above noted.

We are driven to the conclusion that, notwithstanding the intervention of the guaranty fund commission, the corporation continues to be a living concern for the transaction of the business of banking. The commission is an agent appointed by the state to take charge of and manage the business of the defendant corporation. But the state has no pecuniary interest in that business. If the bank finally succeeds and makes a profit, the state can claim no part thereof; if it fails, there is no liability upon the state to pay any portion of its losses. The judgment herein is to be paid out of the assets of the bank, not by the state.

It seems, therefore, that, although the commission is appointed by the state and answerable to the state for the faithful performance of its duties, it is in truth and in fact the agent of the corporation, taking the place of its officers and directors as manager of its business. Whether or not the guaranty fund commission, as such, may be sued in respect of the business by it conducted, we need not and do not decide. The suit here is against the corporation. If during the conduct of the business of the

bank it became necessary to sue one of its debtors, no doubt the action would have to be brought by the commission, but it would be brought in the name of the corporation. On the other hand, a suit against the corporation could hardly be brought by the commission, unless perhaps for recovery of its assets, or protection of its right of possession.

If we are right upon the proposition that the corporation still exists as a legal entity, then it has a right to sue and be sued the same as though its affairs were being managed by its officers and directors, with this exception, that, inasmuch as the right to the possession of its assets is declared by law to be in the commission, the right of the corporation as such to sue therefor is suspended. The liability of a corporation upon its contracts stands upon a different basis, and we see no objection to the maintenance of a suit of that character for the purpose of determining the rights of the parties, so long as it is not sought to take away or subject any of the assets of the corporation, or to interfere with the possession thereof by the commission. There is no provision in the statute for filing claims against the bank until after the appointment of a receiver. If suits for adjudication of claims due may not be brought, and the commission sees fit to conduct the bank as a going concern for the period of limitations, action upon claims might be barred.

The judgment in the present case has no tendency to do either of the above things. An execution thereon could not be levied upon the property of the bank in possession or under the control of the commission, and if it operated as a lien upon the real estate of the corporation, it would be subject to the final disposition of the bank's assets by the commission, during the time it is in possession under the statute.

It is argued by defendant that the object of this suit is to gain an advantage over other depositors and preferred creditors of the bank by obtaining a judgment drawing 7 per cent. interest for a longer period of time

than may be obtained by other preferred creditors whose claims are not in judgment. Whether or not, if the bank should finally fail and be liquidated, the claim of the plaintiff against the depositors' guaranty fund would be upon his certificate of deposit or upon his judgment, we need not decide. In the opinion of the writer, any excess in amount of the judgment over the amount properly allowable on the certificate of deposit would not be a charge upon the guaranty fund, but might be allowed as a general claim against the bank. But we have not reached this situation. If the bank is finally turned over to its stockholders, it is perfectly just and right that the plaintiff receive the amount of his claim with 7 per cent. interest from the time it became due. That is no concern of the state or the guaranty fund.

We have above set forth what we consider to be the common sense view of the situation presented by this record, but counsel on both sides, in the preparation of their briefs, have exhibited commendable industry in citing a large number of cases for the assistance of the court, and we have examined many of them and have been guided by them to a considerable extent in arriving at the conclusions set forth in the earlier part of this opinion. We will now refer to some of them which we think applicable to the question before us. The case of the *Metropolitan Savings Bank & Trust Co. v. Farmers State Bank*, 20 Fed. (2d) 775, is almost precisely the same as the instant case on its facts. The action was brought in the district court of the United States for the district of Nebraska, upon a certificate of deposit for $5,000, issued by the Farmers State Bank July 12, 1924, prior to the bank being taken over by the guaranty fund commission of the state of Nebraska (this being the only point of difference), which event occurred April, 1925, at which time, and since, the bank was being operated by the commission as a going concern. Motion to dismiss the action as being one in effect against the state was sustained by Woodrough, J., and appeal taken to the circuit court of appeals, where

it was reversed and remanded, with direction to proceed in the usual course. In an exhaustive and well-written opinion by Molyneaux, D. J., the precise question before us was discussed and decided adversely to the claim of the commission. We will not take the space necessary to analyze that decision, but will only say that in our judgment it is well reasoned and correctly interprets the statutes of this state, which are set out quite fully. The gist of the court's holding is set out in syllabus 3, as follows:

"Corporate existence of corporation is not affected by the appointment of a receiver of its property, and corporation remains subject to actions at law to the same extent as if no receiver had been appointed, except as such actions may be restrained or enjoined in receivership proceedings, and no action can be maintained in any way affecting or embarrassing receiver in the possession of the property of the corporation to which his receivership entitles him."

We quote the following from the opinion:

"The mere fact that an agency of the state is, under the law of the state, placed temporarily in management of the bank in the place of the bank's officers, does not constitute the banking corporation an arm or agency of the state, or entitle it to claim immunity from suit on the theory that it is identical with the state. The action is against the corporation; neither the state nor any department of the state are made a party; nor were they necessary parties, nor proper parties, to the action. The judgment to be rendered in the suit is to be satisfied out of the property of the corporation. The suit is not directly or indirectly an action against the state"—citing authorities.

It is true, as suggested by counsel for defendant, the decisions of the federal courts are not conclusive as binding precedents upon the state courts in the interpretation of state statutes, but the decisions of the United States circuit courts of appeals are entitled to very great

respect and are of great weight as authorities when their reasoning meets with our approval.

The cases cited in support of the conclusion in the *Farmers State Bank* case present a wide range of circumstances upon which the question arose, but in most of them the pivotal question was whether or not the state in its governmental capacity had an interest in the subject-matter of the suit; as was held in *Coal & Coke R. Co. v. Conley & Avis*, 67 W. Va. 129, the interest of the state in the subject-matter of a suit to which it is not a party must be direct, not merely incidental and consequential. As we have attempted to show, the state has no interest in the present action, which involves merely the liability of the bank to its depositor.

The defendant relies upon five cases in which it is held that a suit against a governmental agency is in effect a suit against the state, and cannot be maintained without the state's consent. We think none of these cases are applicable to the present action and are easily distinguishable therefrom. We will examine them briefly. The case of *State v. Mortensen*, 69 Neb. 376, was an action against the members of the board of public lands and buildings in their official capacity to compel the specific performance of a contract to furnish plaintiff a number of convicts to perform labor in plaintiff's factory, and the court held that such a contract was in substance one with the state, and that the court had no jurisdiction. The case of *Lankford v. Schroeder*, 47 Okla. 279, was a suit against the bank commissioner to compel him to pay a debt against a failed bank out of the state guaranty fund, or out of assets of such bank in his hands as such officer. It was held, in effect, a suit against the state. The case of *Lovett v. Lankford*, 47 Okla. 12, was a suit in mandamus to compel the defendants, as members of the banking board, to pay the claim of plaintiff out of the depositors' guaranty fund. It was held to be a suit in effect against the state, and that the discretion of the banking board could not be controlled by mandamus. The case of *Lankford v.*

Platte Iron Works Co., 235 U. S. 461, another case from Oklahoma, was a suit by a depositor in the bank to compel payments from, distribution of, and assessments for the depositors' guaranty fund. It was held, in view of the rulings of the Oklahoma courts that the statute creating the state banking board intended to give the state a definite title to the depositors' guaranty fund, that the suit was one against the state.

If the present action had been brought against the guaranty fund commission, or sought in any way to control the action of the commission with respect to the assets of the bank in its hands, or the distribution of the depositors' guaranty fund, the above cases would have a direct application; but the suit, being one against the banking corporation, cannot affect in any way the administration and distribution of the assets of the bank or the guaranty fund.

The fifth case is *Hertz v. Knudson*, 6 Fed. (2d) 812, which was an action brought by the department of trade and commerce against Hertz and Levine to recover assets in their hands belonging to the Lyon Bonding & Surety Company, an insolvent insurance company in the hands of the department for liquidation. It was held that the suit was one by the state, of which the federal court had no jurisdiction. It will be readily noted that that action was brought by a department of the state, which clearly distinguishes it from the one at bar.

Our conclusion is that the judgment of the district court should be affirmed.

AFFIRMED.

RICHARD STOWE V. STATE OF NEBRASKA.

FILED JULY 10, 1928. No. 26360.

1. **Felony**: INDICTMENT. "A person accused of a felony must be charged by an information or indictment which discloses the 'nature and cause of accusation' preferred against him." *Moline v. State*, 67 Neb. 164.

2. **Criminal Law: INDICTMENT: CONSTITUTIONAL GUARANTY.** Under section 10186, Comp. St. 1922, the court will not ignore "error as to any matter of pleading or procedure" in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the "nature and cause of accusation" against him.

ERROR to the district court for Douglas county: JAMES M. FITZGERALD, JUDGE. *Reversed.*

George H. Merten, for plaintiff in error.

O. S. Spillman, Attorney General, and *Bryce Crawford, Jr., contra.*

Heard before GOSS, C. J., ROSE, DEAN and THOMPSON, JJ., and CHASE and WHEELER, District Judges.

GOSS, C. J.

A jury found the defendant guilty of larceny of "property" valued by it at $75. From a judgment and sentence thereon the defendant brings error proceedings. Various errors are assigned. Only one of them needs discussion.

The information served on the accused and to which, when arraigned, he pleaded not guilty consisted of two counts. Count 1, omitting words not in controversy, charged that the defendant "unlawfully and feloniously did steal, take and carry away $75 in money, of the value of $75, the personal property of the United States National Bank, a corporation;" count 2 charged that the defendant, "then and there being the bailee of certain personal property of the United States National Bank, a corporation, and while said property was so held by him, as such bailee, did then and there unlawfully and feloniously convert said property to his own use."

After the state introduced its evidence and rested, counsel for defendant announced that he would like to take a recess until 2 o'clock to give him time to prepare a motion, and the court, stating that it was near the noon hour, granted the request. When court reconvened the prose-

cutor asked leave to reopen his case and to amend the information by inserting after the words in count 1, "the value of $75," the following clause: "And certain creamery checks signed by the Harding Creamery Company and indorsed by the payees therein named in blank, of the value of $73.76." Over the objection of counsel for defendant the court allowed the amendment. The prosecutor then voluntarily announced that counts 1 and 2 were in a measure similar, and, if required to elect on which count he would stand, he would elect to stand on count 1. Evidently the court understood him to elect that, for in his charge to the jury the court, without further explanation, stated the issues in the first paragraph of his instructions by reciting count 1 as if the amendment previously allowed were in that count, and made no reference to the second count. The trial proceeded without any further arraignment or plea or time to meet the new matter injected into the information by the amendment.

Was the amendment in the circumstances recited such a violation of the constitutional rights of the defendant as to amount to prejudicial error?

Article I of our state Constitution is very properly termed a "Bill of Rights." Section 11 thereof says, so far as it need be quoted here: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof." Pursuant thereto and to carry it into orderly effect, the legislature has provided that "no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid." Comp. St. 1922, sec. 10104. Informations are governed by the same rule as indictments. Comp. St. 1922, sec. 10086.

The prosecution was begun by complaint in the municipal court. The transcript thereof is in the record. It

shows that counts 1 and 2 both charged the stealing of $75 in money from the bank, one directly, and the other as bailee. Thus the defendant never had any preliminary hearing on the charge of larceny of anything but money. The second count of the information upon which he was arraigned in the district court, heretofore quoted, is an indefinite charge of larceny as bailee of certain personal property of the bank. Taken with what was charged in the same count in the complaint in the court below it could not have given him notice of the charge included in the amendment to the first count of the information to the effect that he was accused of stealing the creamery checks there described; for checks are not money, though when good they may often be exchanged for money. For the purpose of preparation for trial it might often be that one charged with larceny would be at as distinct a disadvantage when sought to be convicted by proofs of stealing checks on an indictment for stealing money as would one when sought to be convicted by proofs of stealing a steer on an indictment for stealing a horse.

The defendant was, in the end, tried and convicted on the first count, as that was the only count submitted to the jury. The verdict says: "We the jury * * * do find the said defendant guilty of larceny and find the value of the property stolen to be seventy-five dollars as charged in the information." There is nothing in the verdict to show the nature of "the property stolen," whether money or other property or both. The proofs do not appear to us to indicate the possibility of the jury finding that more than $25 in money had been stolen. This analysis of the verdict shows that the jury cannot be said to have reached their verdict on count 1 of the information as originally drawn. The jury must have been influenced by the amendment.

The defendant, therefore, was not charged in the information in such fashion as to disclose the "nature and cause of accusation" against him and on which his conviction must rest, if at all. "A person accused of a felony must be charged by an information or indictment which

discloses the 'nature and cause of accusation' preferred against him." *Moline v. State*, 67 Neb. 164. In the course of that opinion the court said, page 171: "The object of the constitutional guaranty is doubtless for the purpose of having the accused informed of the precise offense for which he must answer, and thus enable him to meet and defend against that particular accusation, when judicially called upon to do so."

It is sought by the state to avoid the effect of the record made by defendant by the application of our statute that prevents us from setting aside a judgment in any criminal case "for error as to any matter of pleading or procedure," if after examination of the entire cause we shall consider that no substantial miscarriage of justice has actually occurred. Comp. St. 1922, sec. 10186. We do not regard this as a mere error as to a matter of procedure, but rather as a violation of the constitutional right of the defendant. That right the legislature never intended to take away by the section sought to be invoked. Under section 10186, Comp. St. 1922, the court will not ignore "error as to any matter of pleading or procedure" in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the "nature and cause of accusation" against him.

The conclusion which we have reached renders it unnecessary to discuss other matters assigned. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WHEELER, District Judge, dissents.

JACOB C. ROTH, APPELLEE, V. CHARLES BLOMQUIST, APPELLANT.

FILED JULY 10, 1928. No. 25974.

Negligence: OPERATING AUTOMOBILE IN NIGHTTIME. As a general rule it is negligence as a matter of law for a motorist to drive

an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELY, JUDGE. *Reversed and dismissed.*

John W. Yeager and *J. C. Cook,* for appellant.

Gray, Brumbaugh & McNeil contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

ROSE, J.

Jacob C. Roth, plaintiff, brought this action to recover from Charles Blomquist, defendant, $11,400 in damages for alleged negligence. While plaintiff in a Ford coupé was driving westward with his wife on the Lincoln Highway in Valley after dark on the evening of November 17, 1924, he ran into a wagon in which Thomas Corbett, a farm-hand in the employ of defendant, was driving a team of horses northward at a farm crossing. Plaintiff and his wife were injured and his coupé was damaged. The negligence imputed to defendant is that his employee, without any light on the team or wagon, knowing, or chargeable with notice, of plaintiff's approach, drove the team from the south across the highway directly in front of the coupé at an unlighted private crossing not apparent to plaintiff or known by him to exist, thus causing the collision. The answer of defendant contains a denial of the negligence charged in the petition and also a plea that the collision and the resulting injuries were caused by plaintiff's negligence. Defendant's charges of negligence were put in issue by a reply to the answer. Upon a trial of the issues the jury rendered a verdict in favor of plaintiff for $4,975. From a judgment therefor defendant appealed.

Insufficiency of the evidence to sustain the verdict is urged as a ground of reversal. The collision occurred on

a straight, level, unobstructed, paved highway. The pavement was 18 feet wide and the roadway was 4 feet or more in width on each side. Defendant farmed land on both sides. His farm buildings were north of the highway near the east line of Valley. A sign by the roadside warned motorists approaching the village from the east that the municipal speed limit was 15 miles an hour. There was a farm crossing from the south to defendant's barn. In the afternoon of November 17, 1924, Corbett had been husking corn in a field south of the highway, using a team of horses hitched to a wagon with high sideboards. He had unloaded the wagon at a crib south of the highway and had started to the barn in the empty wagon. He approached the farm crossing after lights on passing cars had become necessary.

In his own behalf plaintiff testified in substance: The lamps on his car threw the light 40 or 50 feet ahead; first saw the team and wagon when probably 20 or 25 feet from them; was not going over 25 miles an hour—about that rate; horses had traveled half the distance across the highway before he saw them; rear of horses about center of highway at the time of the impact; thought most of the team was then practically across the pavement; nothing to obstruct his view; lights of other cars did not interfere.

In attempting to make his case plaintiff was bound by his own testimony, which shows conclusively in connection with evidential facts not disputed that he could not stop within the distance that his lamps threw light ahead of his car upon discovering the team and wagon. A general rule of law has been stated thus:

"It is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision." Berry, Automobiles (5th ed.) sec. 177. See, also, Huddy, Automobiles (8th ed.) sec. 396, and 1 Blashfield, Cyclo-

pedia of Automobile Law, ch. 16, sec. 17, p. 350, and cases cited in the texts.

This general rule is supported by sound reasons and the overwhelming weight of authority. When applicable to the facts a violation is of itself negligence precluding a recovery in favor of the motorist for resulting injuries to himself or to his property. Without such a rule the hazards at farm and highway crossings and at other places on the lines of public travel would be unnecessarily and alarmingly increased. There are at night instances in which persons in charge of domestic animals or other property suddenly or temporarily, in absence of negligence, obstruct a highway without opportunity to give drivers of approaching automobiles instant notice. A farmer in the exercise of due care may return from his own field at dusk with a team and wagon and cross a highway to his barn. In doing so he is not required by statute to carry a warning light. In the present instance the farm-hand did nothing to prevent the application of the rule quoted. His team was nearly across the pavement at the time of the impact. Had the coupé been approaching at a reasonable speed under the circumstances he would have crossed in safety. Before driving onto the pavement he looked toward the approaching car when he had a right to believe he had time to cross. Plaintiff did not make a case and there should have been a peremptory instruction in favor of defendant.

There are recognized exceptions to the general rule or instances to which it does not apply, among them an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated *(Tutsch v. Omaha Structural Steel Works,* 110 Neb. 585); corner of a platform with a narrow edge extending from a drag line over a street car track and discernible only in close proximity to the obstruction *(Day v. Metropolitan Utilities District,* 115 Neb. 711); an obstruction consisting of a pile of gravel similar in color to

the surface of the highway (*Frickel v. Lancaster County*, 115 Neb. 506).

For the reasons stated, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF WOLBACH: I. A. KIRK, RECEIVER, APPELLEE: JAMES T. BIGELOW, CLAIMANT, APPELLANT.

FILED JULY 10, 1928. No. 26102.

1. **Banks and Banking**: GUARANTY FUND: DEPOSITS. "Ordinarily, where a stockholder of a state bank, with knowledge that the bank is insolvent or in an unsafe condition, at the instance and request of the bank officials obtains and places in or to the credit of the bank money, to enable the bank to meet a pressing obligation, and where the money is not placed in or at the command of the bank, for the use, safe-keeping or convenience of the stockholder, in the ordinary and usual course of business, such transaction does not constitute a good-faith deposit, within the meaning of the guaranty fund law, and is not protected by the depositors' guaranty fund." *State v. Atlas Bank*, 114 Neb. 646.
2. ———: ———: ———. "In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank*, 111 Neb. 117.

APPEAL from the district court for Greeley county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

T. T. Bell and *Prince & Prince*, for appellant.

C. M. Skiles and *Lanigan & Lanigan, contra.*

Heard before GOSS, C. J., ROSE, DEAN, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

DEAN, J.

Some time in February, 1925, the Farmers State Bank of Wolbach, hereinafter called the bank, closed its doors and soon thereafter came into the hands of I. A. Kirk, as receiver. In the present action James T. Bigelow, the claimant, seeks to recover from the receiver approximately $33,484, which he contends was placed by him in the bank, from time to time, as money deposited, and that it therefore comes within the meaning and the protection of the depositors' guaranty law. The claimant also seeks to recover lawful interest thereon until paid. In his petition he pleaded 15 separate causes of action. Two of these were allowed by the district court as valid claims against the depositors' guaranty fund. One of these is in the sum of $600 and the other is in the sum of $573, both claims so allowed aggregating $1,173. The receiver joins in a statement with counsel for the guaranty fund wherein it is agreed that the two claims so allowed by the court are "not contested." It follows that the claims so allowed will not be further noticed here. All of the remaining 13 certificates of deposit, whereon the claimant seeks to recover approximately $32,311, were disallowed as claims against the depositors' guaranty fund, but were allowed as general claims against the bank. From the above noted disallowance of payment of a very large part of his claim from the bank guaranty fund the claimant has appealed.

Aside from the two claims which were allowed, as noted above, the main question now before us is this: Did the remainder of the money which was placed in the bank in question here by the claimant constitute a loan of money to the bank, or did it constitute a deposit within the meaning of the bank guaranty law? The record is replete with evidence which was submitted, both by the claimant and by his nephew, M. T. Kernodle, the latter being cashier of the bank when it closed its doors, all of which goes to show that the so-called deposit does not come within the protection of the depositors' guaranty fund. The record contains more than 100 letters which passed between the

claimant and the cashier in respect of the conduct of the bank's business, and these letters likewise support the proposition that the moneys placed in the bank from time to time by the claimant, or at his direction, were not deposits, but were loans made by claimant to the bank to tide it over the straitened circumstances into which it had fallen. The letters, and other of the evidence, all go to show that the claimant was deeply interested in the bank in a financial way and that he was the owner of a large block of bank stock, namely, upwards of 80 shares.

Following are excerpts from some of the letters that passed between claimant and the cashier of the bank and which claimant wrote:

"Dear Tommy: I have your letter and note what you say and must confess that it is another surprise, as I took it from your last letter that you could get a little more money from Omaha and did not think you would need more. I had presumed that with the hogs and cattle you told me were there for sale, it would pull you through. I hardly see how I can come down there, as I have not the money to spend, and can see no good in it, as I have about gone my limit as I told you when you were here. I have sold all my bonds having sent in the last yesterday at $87 per hundred in order to meet some interest that I have to pay July 1, and as I have borrowed heretofore all I cared to, I am at the limit. I may be able to squeeze out a couple of thousand more, but if you have to close up and burst me up in business also, why we might as well stop now."

"Dear Tommy: I received your letter and also note what you said in your conversation. I am sending under separate cover a letter to the bank with draft and you can leave the letter where your assistant can see it. Of course some of it is hot air. Money is tight here and I am hard up. Had to borrow 20M yesterday. Therefore get along with as little as you can, but if you need help let me know."

Under date of August 21, 1921, a letter was written by

the cashier to claimant Bigelow, wherein among other things this is said:

"Dear Uncle: I received your letter and glad to hear from you, and would have been glad if (you) had come down had it been so you could. * * * This has been the hardest year that I ever put in trying to do something and could not make but very little progress or rather the progress that I wanted to. * * * I know I am going to have to have a little money but don't think it will have to be very much for I just will not loan any. I wish we would not have to have more for I regret it just as much as any one can but still I cannot help it. I have tried to make every effort count since a year ago but conditions have been so different from anything I ever saw that it was impossible to do what you wanted to do. Our reserve is off about $3,000 to $4,000 the last month which puts us below the requirements so I want to ask you to help us."

Under date of April 14, 1915, the cashier wrote to claimant and, among other things, this appears:

"Dear Uncle: We are going to have a meeting today and get matters settled some way. It looks now as if there is only one way. Smith went after Thompson for talking to you when you were here without having him present. So under such conditions it is very important that we get rid of such unsettled conditions. It is possible that I might want $5,000 the same as the amount you have already helped me with. I will not want it unless it is absolutely necessary. Our reserve has gone down quite a little in past few days and if Smith goes out it is natural that he will hurt all he can and take all that he has in here, which is about $7,000."

Other letters of like import passed between claimant and the cashier, all of which, in addition to the oral evidence, go to show that the claimant was vitally interested in the management of the bank from an early date until it closed its doors.

Section 24, ch. 30, Laws 1925, among other things, provides:

"No claim to priority shall be allowed which is based upon any evidence of indebtedness in the hands of or originally issued to any stockholder, officer, or employee of such bank, which represents money obtained by such stockholder, officer, or employee, from himself or some other person, firm, corporation or bank in lieu of or for the purpose of effecting a loan of funds to such failed bank."

The following citations of authority support the conclusion which we have reached in the present case. In *State v. Atlas Bank,* 114 Neb. 646, we held:

"Ordinarily, where a stockholder of a state bank, with knowledge that the bank is insolvent or in an unsafe condition, at the instance and request of the bank officials obtains and places in or to the credit of the bank money, to enable the bank to meet a pressing obligation, and where the money is not placed in or at the command of the bank, for the use, safe-keeping or convenience of the stockholder, in the ordinary and usual course of business, such transaction does not constitute a good-faith deposit, within the meaning of the guaranty fund law, and is not protected by the depositors' guaranty fund."

See, also, *State v. Atlas Bank,* 114 Neb. 650; *Iams v. Farmers State Bank,* 101 Neb. 778.

"In order to create a deposit which will be protected by the guaranty law, as the term 'deposit' is understood in section 8033, Comp. St. 1922, it is necessary that money or its equivalent shall in intention and effect be placed in or at the command of the bank under circumstances which do not transgress specific limitations of the bank guaranty law." *State v. Farmers State Bank,* 111 Neb. 117.

In *First Nat. Bank v. Hirning,* 48 S. Dak. 417, the court held: "One loaning money to bank with full knowledge that bank is unsafe, to enable its officers to increase depleted reserve, or for some other use of bank, and not for safe-keeping or convenience to him as depositor, though form of transaction appears as deposit, is not 'depositor' entitled to participate in guaranty fund."

In view of the facts in the present case and the law applicable thereto we hold that the money placed in the bank by the claimant, except the sum of $1,173, to which reference is made herein, does not constitute a deposit within the meaning of the bank guaranty law, but was merely a loan of money to the bank and is not protected by the bank guaranty law. Comp. St. 1922, sec. 8033.

We conclude that the judgment of the district court is right and must be and hereby is in all things

AFFIRMED.

ARTHUR H. JOHNSON ET AL., APPELLANTS, V. PLATTE COUNTY ET AL, APPELLEES.

FILED JULY 10, 1928. No. 26075.

Drains: COUNTY SUPERVISORS: SECRET MEETING: ESTABLISHMENT OF DRAINS. Proceedings of county supervisors, to establish and construct a drainage ditch, which are in substantial respects conducted secretly and behind closed doors, to the exclusion of the public and interested parties, are in violation of section 972, Comp. St. 1922, which provides: "The board of supervisors shall sit with open doors, and all persons may attend their meetings"—and, in a proper case, the supervisors will be enjoined from constructing a ditch ordered under such proceedings.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

McElfresh & Walker, for appellants.

Reeder & Reeder, George W. Wertz, Emil F. Luckey and *B. F. Farrell, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON and HOWELL, JJ., and BEGLEY and REDICK, District Judges.

HOWELL, J.

This is an appeal from a decree of the district court for Platte county, denying plaintiffs, appellants, an injunc-

tion asked against Platte county and its supervisors and the commissioners of Colfax county, against levying assessments on plaintiffs' lands to cover cost and expenses of constructing a proposed drainage ditch, and from taking other proceedings looking to paying out and letting contracts for such ditch to extend into both counties.

As we see the case, the chief cause of complaint is the failure of the supervisors to "sit with open doors," as provided in section 972, Comp. St. 1922, which reads: "The board of supervisors shall sit with open doors, and all persons may attend their meetings."

A number of petitions were filed for a ditch. We will deal only with the petition called "last petition," finally acted on, filed March 10, 1926.

A view was made of the route proposed, after which the boards met in joint session. Certain objections were filed by the appellants. The boards, over objections, voted to go into executive session, which was done, to consider the routes of ditches. Appellants and others who were interested were excluded from the room for half an hour, after which time the boards allowed appellants and the public to reenter the room. The boards at once adopted a resolution in favor of the so-called "long route" based upon the first and last petitions, although appellants sought, without avail, to offer further evidence before the resolution was adopted. The motion to go into executive session, as shown by the record, was "for the purpose of discussing the proposed drainage ditch routes now on file."

Engineers were then employed, who filed reports assessing the lands and otherwise going forward with the scheme. This suit was commenced and all activities ceased. The words of the motion follow: "Motion, Supervisor Schaecher, seconded by Supervisor Bender, that we now go into executive session for the purpose of discussing the proposed drainage ditch routes now on file. Motion carried."

It is quite clear that, at that time, the boards had not reached a conclusion. Whatever transpired in the "executive session" fitted them, in their own minds, to make the

final decision necessary to override the protests of appellants. It matters little what transpired in that secret session. They, and they only, could know. Had the doors been open, all those present would have known. The public and all others were excluded for the declared purpose. It was deliberate and not incidental.

The legislature intended to put an end to just such actions by striking at secret conclaves.

Counsel for appellees concede "such meetings must be open to the public." They state the "sole purpose was to afford the members an opportunity for relaxation into a round table discussion of the several proposed routes." The motion states otherwise. The language of counsel and of the motion are admissions that the "open doors" provision of the statute was violated in both letter and spirit. Appellees' brief says: "After the doors were opened, * * * the public filed in." It appears, just before the doors were closed on the meeting, the public filed out by order of the boards, over the protest of appellants. The meeting was on in full sweep. The boards did not retire; they sat where they were and excluded every other person. There they sat, behind closed doors, and functioned; there they sat, with open doors, and functioned. They held the forum as a body, while the public filed out, wondering, no doubt, what was going on.

Such proceedings cannot be said to measure up to the wholesome and uninjurious requirements of the statute. It is not deemed necessary to follow the other contentions of the parties. What has been said necessarily leads to a reversal of the decree of the trial court, with instructions to enter a decree permanently enjoining defendants, as prayed by plaintiffs.

REVERSED.

OTTO F. MORELAND, ADMINISTRATOR, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY ET AL., APPELLANTS.

FILED JULY 10, 1928. No. 26068.

1. **Railroads: CROSSINGS: DUTY OF TRAVELER.** "It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.
2. ———: ———: ———: **NEGLIGENCE.** Under the evidence in this case, *held* that a freight train standing on a side track 100 feet west of a crossing is not such a diverting circumstance that would excuse a traveler on a highway from looking toward the east within 80 feet of the crossing for an approaching passenger train. And failure to do so constitutes negligence on the part of such traveler.
3. ———: **COLLISION AT CROSSING: NEGLIGENCE.** Where it is undisputed that a traveler on a highway failed to exercise reasonable precaution, by not looking at a reasonable point where he could have seen an approaching train, his negligence will defeat a recovery for a collision with a train at a crossing, even though no signal by the locomotive bell or whistle was given.
4. **Evidence** examined and set out in the opinion and *held* insufficient to sustain a verdict and judgment in favor of plaintiff.

APPEAL from the district court for Cherry county: EARL L. MEYER, JUDGE. *Reversed and dismissed.*

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz*, for appellants.

James C. Quigley, Peterson & Devoe, and *Good, Richardson & Good, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON, EBERLY and HOWELL, JJ., and BEGLEY and BROADY, District Judges.

BROADY, District Judge.

This case grows out of a collision at a highway crossing between a passenger train and an automobile which

resulted in the death of Hubert Roy Moreland. The plaintiff, as administrator of the estate of the deceased, brings the action against the railroad company, and claims negligence on the part of the railroad company in (1) that the train was, at the time, running at a high rate of speed in violation of an ordinance of the village within which the accident happened, and (2) that the railroad was negligent in that it failed to give any warning of the approaching train by either blowing the whistle or ringing the bell as required by law. The railroad company denies any negligence on its part, and claims that the deceased and the driver of the automobile, in which decedent was riding, were negligent in going upon the crossing without looking and listening within 100 feet of the crossing; and at the conclusion of the evidence moved for a directed verdict in favor of the defendants. This motion was overruled, and the case submitted to a jury, which returned a verdict in favor of the plaintiff in the sum of $33,000.

The accident occurred within the limits and on the outskirts of Crookston, a small village in Cherry county. The railroad runs approximately east and west and is the main line of the Northwestern from Council Bluffs, Iowa, to South Dakota and Wyoming. Moreland and Donald Ogilvie were partners in a general insurance agency, and, as such, jointly owned the automobile, bore the expenses equally and divided the income of the business in equal shares, and on the date of the accident were engaged in this business, and traveling in a Ford coupé. Ogilvie was driving the car and sitting on the left side, Moreland on the right side, of the seat. They were coming from the west paralleling the railroad, and at a point approximately a quarter of a mile south of Crookston turned north and approached the village at right angles to the railroad track. From this point both could and did see the railroad tracks. Both were familiar with the crossing, as they had traveled this road on previous occasions. As the automobile turned to the north towards town, the road descends somewhat and crosses a bridge across a small creek. Immediately

to the right of the bridge were small trees and growing brush, which at the time were bare of foliage, as the accident occurred early in March. The bridge was 239 feet south of the railroad crossing, and from this point there was a clear and unobstructed view of the railroad for a distance of approximately 1,000 feet east, where the track runs through a cut in an embankment or small hillside. There is a clear, unobstructed view of the tracks from the crossing to this cut. To the left of the crossing, approaching from the south, is an unobstructed view of the track for some 300 feet, where the section-house in which the track-worker lives is located. Beyond that, to the west, are the usual railroad station, or depot, elevators and other buildings usually found around railroad yards in a small town. The highway was of a deep sand surface, and at a point approximately 100 feet south of the crossing is up-grade to the track level. The last 35 or 40 feet the road ascends rather abruptly.

Ogilvie said that just after crossing the bridge, 200 feet south of the track, he looked in both directions and could see no train approaching from the east, but did see a freight train with engine attached headed east, standing approximately 100 feet west of the highway crossing. Ogilvie did not again look to the east, but kept his attention directed to the freight train to ascertain whether or not it was going to start moving. He said the engine, though standing still, was emitting steam in considerable quantities, and he thought it was about to start. The freight was standing on a side track, waiting for the passenger coming from the east to pass. The track was elevated above the level of the highway, and Ogilvie said he could not see whether the freight was on the main track or side track. Ogilvie says that he did not look east after a point 100 feet south of the crossing, but gave his attention to the freight train and to the driving of the car through the sandy roadway, and the up-grade approaching the tracks, but says that he kept listening for any warning of an approaching train, of a whistle or sounding of a

bell, and heard none. He says that Moreland, the deceased, was also listening for any approaching train, and, at a point between 80 and 100 feet south of the crossing, looked east, at least twice, and said to Ogilvie, "Everything is clear on my side," and from then on both kept looking at the freight train and did not look to the east.

On cross-examination Ogilvie said that his watching of the freight did not, however, prevent his looking to the east at any time, and that he could have stopped the car almost instantly, as it was traveling only from four to six miles an hour. He also said that, at a point something over 100 feet south of the track, he had practically stopped the automobile and then ran in low gear. As the rear end of the automobile passed over the track it was struck by a passenger train coming from the east. The automobile was demolished and Moreland fatally injured and died shortly thereafter. Ogilvie, apparently, was uninjured.

Plaintiff contends that the position of the freight train, standing to the left of the crossing, was such a circumstance as to direct and divert the attention of the occupants of the automobile and excuse their not looking to the right after they had left a point between 80 to 100 feet south of the crossing, and claims that the passenger train was coming at a high rate of speed in violation of the city ordinance, which limited the operation of railroad trains within the village to 10 miles an hour; and also claims that the failure of the engineer to sound the warning whistle or bell was the proximate cause of the accident. The ordinance of the village does limit the operation of trains within its territory to not exceed 10 miles an hour. The defendants claim that this ordinance is void, being an unreasonable restriction in the necessary operation of such trains; claims that both the whistle and the bell were sounded and ringing continuously from the point of the cut in the embankment, or 1,000 feet east of the crossing. The engineer says that he sounded the whistle at the mile post east of the station and that he kept the whistle blowing from that point until the accident happened. Several

other witnesses stated that they heard the whistle, but differed as to the number and kind of sounds made by the whistle. Some of these witnesses were in the depot 300 or 400 feet west of the crossing. Others were residents of the village and were at different points from the tracks. The fireman corroborates the engineer both as to the question of whistling and ringing the bell. Both say that the engineer had set the mechanism which rang the bell by air and that the bell was ringing continuously prior to and until after the accident. Both the engineer and fireman say that, after the accident and after the train had stopped, the engineer directed the fireman to shut off the air from the bell cord, and that the bell was ringing until that time. This is corroborated by at least one other witness. Ogilvie says that he and Moreland were both listening and did not hear either the bell or whistle. To quote Ogilvie's direct testimony as to his listening after he crossed the bridge, he said: "We were both listening at all times for a train from the east as well as the west." But he did not look, and a mere glance to the east would have disclosed the coming train. It is the duty of one approaching a railroad crossing to look as well as listen. Several witnesses called by the plaintiff testified that they did not hear either the whistle or bell, and some of them said that they were in a position so that they could have heard the bell or whistle had either of them sounded. It is the duty of a railroad train in approaching a crossing to give warning of its approach by blowing the whistle and sounding the bell continuously from a point 80 rods from a crossing. *Campbell v. Union P. R. Co.*, 100 Neb. 375. The evidence upon the question of warning is conflicting, and upon that question, standing alone, it would be a question for the jury.

It must be taken as undisputed that the train was at the time running in excess of 30 miles an hour, at least. The engineer says that at the time the accident happened he was running from 30 to 35 miles an hour, and that he had partially set the brakes, some distance east of the cross-

ing, preparatory to stopping at the station. Ogilvie said, and it is undisputed, that after he crossed the bridge and was approaching the track he was running the automobile about 5 miles an hour, and that as he approached the incline, or upward grade over the right of way, he increased his speed a little, due to the incline and the heavy sand roadway. The day was clear and dry with no wind blowing and the road dry and in good condition other than it was up-grade approaching the track and a heavy sand surface.

The engineer, on the right or north side of the engine cab, did not see the automobile approaching from the south. The fireman sitting on the left, or south side of the cab, saw the automobile approaching, but says it was running slowly, and he thought the driver saw the train and was stopping, but that when starting up the incline to the track the automobile speeded up somewhat. He then feared a collision and called to warn the engineer, but that because of the noise of the blowing whistle and ringing bell the engineer could not hear him, and that he, the fireman, then started across the cab to warn the engineer. At that moment the accident occurred. The engineer said that he could have stopped the train within 400 or 500 feet, and when it did stop the engine was almost even with the depot, and that he, the engineer, ran back to the injured Moreland, whom he asked if he did not see the train, and that Moreland said: "Yes; but it was too late." A woman who had run out of the depot said that Moreland made the same statement to her.

The principal question is whether or not Moreland was himself guilty of negligence which was either the cause of or which contributed to the accident and which would bar recovery even though the defendant was negligent. This question must be determined under the comparative negligence statute of this state, which is that, even though the defendant was negligent, the plaintiff could not recover if he himself were guilty of more than slight negligence as compared to any negligence of the defendant, or if the

defendant was guilty of less than gross negligence as compared with the negligence of plaintiff's decedent. We concede that the question of contributory negligence is for the jury, unless it cannot be said that reasonable minds would differ on this question.

The plaintiff contends that the presence of the freight train was a diverting circumstance sufficient to excuse the occupants of the automobile from looking at a point closer to the crossing than they did look, and that the question of contributory negligence, if any, was a question for the jury, and by their verdict the jury determined that question in favor of the plaintiff.

"It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266; *Morris v. Chicago, B. & Q. R. Co.*, 101 Neb. 479; *Haffke v. Missouri P. R. Co.*, 110 Neb. 125.

"Failure of the railroad company to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision." *Askey v. Chicago, B. & Q. R. Co.*, 101 Neb. 266.

The *Morris* case, *supra*, holds that the plaintiff could not recover if he himself were negligent, even though no signal by bell or whistle was given by the appproaching train. In the *Haffke* case, *supra*, it is held that, where it shows beyond a reasonable dispute that the plaintiff's negligence was more than slight as compared with the neg-

ligence of the defendant, it is the province of the court to direct a verdict for the defendant. See, also, *Tyson v. Missouri P. R. Co.*, 113 Neb. 504.

In the *Haffke* case the court say: "We think it may well be conceded that the evidence with respect to the negligence of the defendant is sufficient to have that issue submitted to the jury, but the question upon which the case must turn is whether the plaintiff was guilty of such contributory negligence as to defeat recovery." In sustaining a directed verdict for the company in that case, the court say: "A mere glance occupying but a fraction of a second would have sufficed to warn him (plaintiff) of the approaching train."

Moreland and Ogilvie were unquestionably engaged in a joint enterprise so that the negligence of either one would be attributable to the other. We think it was the duty of both Ogilvie and Moreland to look eastward at a point closer to the crossing than 80 or 100 feet, as testified was the point at which either last looked. Had either done so, they could not have helped but see this approaching train and could have stopped the automobile within 3 or 4 feet at the most. At a point 50 feet from the crossing one could have seen the track and approaching train for a distance of over 1,000 feet. We do not think any reasonable mind could differ upon this question.

Plaintiff insists that the fact of the standing freight train and the locomotive headed toward the crossing 100 feet away constituted a "diverting circumstance" sufficient to justify both Ogilvie, the driver of the car, and Moreland giving it all their attention, thus excusing their failure to look to the east after passing a point 80 feet from the crossing. As was said in *Hall v. Union P. R. Co.*, 113 Neb. 9: "There may be circumstances which will excuse his (plaintiff's) failure *for a brief period* to look *in every such direction*, and if he suffers injury thereby, his negligence, if any, is ordinarily a question of fact for the determination of a jury." Where, however, such circumstances do exist, it is the duty of such traveler to exert greater

care before crossing the track, unless prevented by some fault of the railroad company. He should use alertness and vigilance before he has taken a position exposing himself to peril or has come within the zone of danger, so that his precaution may be effective. The diverting circumstances must be a condition of reasonably eminent danger to himself and occurring at a point which to ignore could fairly be said to expose him to a perilous position from that cause alone. It cannot be held that an object or condition which arouses curiosity, not dangerous, would excuse caution to guard against another obviously dangerous situation. If the freight train had been moving it would have been sheer recklessness to attempt to cross ahead of it. If it was standing still there could be no danger in crossing. It was standing still and Moreland and Ogilvie both knew it. A mere glance to the right by either, at any point within 50 feet of the crossing, would have disclosed the oncoming train. Both Ogilvie and Moreland were negligent in a degree far more than slight, and even conceding the passenger train was exceeding its speed limit and not sounding the whistle or bell, the contributory negligence of the plaintiff equalled, if not exceeded, any negligence of defendant.

We are not unmindful that members of a court may not, from the very nature of their position, view the circumstances of a particular case as would persons engaged in other avocations, and for that reason are loath to say that a state of facts is not sufficient to support the findings of the jury. But when the undisputed circumstances are too clear and one-sided to say otherwise, it becomes the duty of the court to say, as a matter of law, that there is no negligence, or that the plaintiff was guilty of contributory negligence of more than a slight degree. That is the situation in this case. It is the duty of this court to reverse the decision in this case.

The physical conditions surrounding the scene of this terrible accident are fixed and permanent and are conclusive, and under the plaintiff's own evidence he could not

recover. Therefore, the judgment is reversed and the case dismissed.

REVERSED AND DISMISSED.

HELEN E. SALSBURY ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JULY 10, 1928. No. 26277.

1. **Municipal Corporations**: CHARTERS. Where a city has adopted its own charter under section 2, art. XI of the Constitution, the provisions of such charter will govern, as to matters of local municipal concern, over the legislative charter existing prior thereto. *Sandell v. City of Omaha*, 115 Neb. 861.
2. ———: STREET IMPROVEMENTS. The matter of improving the streets, alleys and highways within the corporate limits of a municipality is a subject strictly of municipal concern.
3. ———: LEGISLATION: COURTS. Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power, as to whether they act expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern.
4. **Pleading**: DEMURRER. A general demurrer does not admit conclusions of the pleader, but only facts that are well pleaded.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Affirmed.*

Allen & Requartte and *W. M. Elmen*, for appellants.

C. Petrus Peterson, Charles R. Wilke and *R. A. Boehmer, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD and THOMPSON, JJ., and CHASE and REDICK, District Judges.

CHASE, District Judge.

This is a suit in equity to restrain the city of Lincoln and its city commissioners from entering into a contract for the paving of the streets in paving district No. 765 in said city. To the petition a general demurrer was inter-

posed which was sustained by the trial court, whereupon the plaintiff elected to stand on the petition and the court entered judgment dismissing the suit. The action of the trial court therein is now presented in this court for review.

The record is brief, consisting only of the petition, demurrer and judgment. The petition is very lengthy, consisting of fifteen paragraphs, also consisting of exhibit A, being the ordinance declaring for the paving of said district; exhibit B, being a plat of the streets and highways upon which said proposed paving is to be laid; exhibit C, the plaintiff's objections before the city council to the letting of said contract; exhibit C-1, being the plaintiffs' protest filed with the city council against the creation of said paving district; exhibit D, being a petition to eliminate from said paving district the property owned by the plaintiffs; and exhibit E, being the resolution of the city council ordering said district paved.

From a careful reading of the petition and exhibits we reach the conclusion that the consideration of three propositions involved will successfully dispose of the entire case: *First,* the question as to which shall prevail where there is an inconsistency—the home rule charter of the city of Lincoln, or the legislative charter which existed prior to the adoption of the home rule charter. *Second,* as to whether or not courts can and will inquire into the legislative expediency and discretion of a city council acting within its authority as to matters of municipal legislation. *Third,* the effect of a general demurrer as to the admission of facts and conclusions appearing in the petition and the exhibits annexed thereto.

By this suit the plaintiffs seek by injunction to prevent the city council of Lincoln from establishing paving district No. 765 within the corporate limits of said city, and the paving of the streets within said districts. The record admits that the city of Lincoln is a city coming within the provisions of section 2, art. XI of the Constitution, which gives authority to cities of over 5,000 inhabitants to

frame a charter for its own government consistent with and subject to the Constitution and laws of the state of Nebraska. This section of the Constitution in express terms provides that, when a city charter is adopted under its provisions, it shall then become the charter of the city adopting the same for the regulation and government thereof "and supersede any existing charter and all amendments thereof." This provision of the Constitution is self-executing. It is apparent that the framers thereof intended that a city having the required population could, independent of any legislative action, draft and adopt a charter under this provision, and when once adopted according to its provisions such charter shall be the law for the general regulation and control of all of its local municipal affairs. The plaintiffs contend that the general statutes of the state require city councils in establishing paving districts to include only intersecting streets, while the charter of the city of Lincoln, subsequently adopted under section 2, art. XI of the Constitution, permits the municipal authorities to include two or more connecting or intersecting streets; that in the creation of the paving district herein complained of there are no intersecting streets, and that the action of the city council is without authority because of that fact.

The rule adopted by this court concerning an inconsistency between legislative enactment and municipal charters is too well established to justify longer discussion. "The purpose of the constitutional provision (Const., sec. 2, art. XI) is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51. See, also, *Sandell v. City of Omaha*, 115 Neb. 861; *Schroeder v. Zehrung*, 108 Neb. 573.

The plaintiffs based their right for injunctive relief upon the passage of an ordinance creating a paving district and the proposal on the part of the city council to enter into a contract for the paving of the streets and highways

within said district. The matter of improving the streets, alleys and highways within the corporate limits of a municipality is one strictly of municipal concern and the municipal authorities in regard to such improvement are only required to act in conformity with the provisions of the charter under which such city has its legal existence, and under the charter of the city of Lincoln its municipal officers are authorized to pave and improve connecting streets as well as intersecting streets.

The plaintiffs contend further that the city council has included property in said paving district as a mere subterfuge to force paving upon the plaintiffs and that to do so will have the effect of confiscating the property of the plaintiffs and force upon them unwarranted burdens of taxation. It is a well-established doctrine that courts will not inquire into or endeavor to control the legislative discretion of city councils in establishing the boundaries of paving districts, nor will they inquire into the motives of legislative bodies, when acting within legal and constitutional limits, nor determine matters concerning the expediency or necessity for such legislation. The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power emanates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not of expediency. To do otherwise would amount to an unwarranted encroachment by the judicial branch of the government upon the powers of the

legislative branch and thus tend to destroy the necessary coordination existing between these two separate branches. The principle was adopted by this court in *Omaha & C. B. Street R. Co. v. City of Omaha,* 114 Neb. 483; *Enders v. Friday,* 78 Neb. 510; *Village of Bellevue v. Bellevue Imp. Co.,* 65 Neb. 52. This court in the quite recent case of *Whitla v. Connor,* 114 Neb. 526, adopted this general principle, wherein it held: "The action of the village board in ordering sidewalk placed, and providing that cost thereof shall be assessed upon the abutting lot, is a legislative determination that the improvement is expedient and proper, and that such property will be benefited by reason thereof, and such determination cannot be denied its effect in a judicial proceeding, in a case where it was within the board's power to so act. And one challenging its authority carries the burden of alleging and proving the invalidating facts." In the event that the proposed improvement would not benefit plaintiff's property or become an injury thereto, these are matters that can be properly considered by the assessing board in levying special assessments, and the plaintiffs have an adequate remedy at law by which to determine the justice of such assessments.

The plaintiffs contend further that the trial court was unwarranted in sustaining the demurrer for the reason that it is alleged in the petition that said district is not created according to law, and that it appears by exhibit C, which is attached to and made a part of the petition, that there is an allegation that the ordinance was not read, approved or passed as required by law; that no sufficient publication thereof had been made; that no sufficient petition for installation of said paving had been filed, and no sufficient advertisement for bids had been had; that the demurrer of defendants admits such above statements to be facts.

The position of the plaintiffs in this regard is untenable. A demurrer does not admit conclusions. The rule is that a general demurrer admits only facts, and then only such facts as are well pleaded. *Markey v. School District,* 58 Neb. 479. In the above case the plaintiffs sought to

recover under a contract with the school district for the sale of school supplies. By the petition it appears that the school district board was without authority to enter into said contract. The petition, in addition, alleged that said contract had been subsequently ratified by the voters without stating in fact as to how it had become ratified. The petition was assailed by general demurrer, and plaintiff contended that the demurrer admitted ratification of the contract. The court held that the allegations concerning ratification were a mere conclusion, and not admitted by demurrer.

Again, the court held, in the case of *State v. Ramsey*, 50 Neb. 166, that an allegation in the petition that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law" was a mere conclusion, and not admitted by the demurrer. So, in the present case, the allegations concerning the passage and publication of the ordinance, the sufficiency of the petition, the advertisement for bids, all contained in exhibit C, are mere conclusions of the pleader, and not statements of fact, which are admitted by the demurrer.

The question argued, as to which will control where there is an inconsistency between the pleading itself and the exhibits thereto attached, is not necessary for determination because the statements in the exibits which create the inconsistency are mere conclusions and cannot be considered as facts out of which any inconsistency can arise, hence to discuss the question further would presuppose the existence of a fact which does not exist.

For the reasons heretofore stated, the judgment is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1928.

WILLIAM M. J. WEGNER v. STATE OF NEBRASKA.

FILED OCTOBER 8, 1928. No. 26341.

ERROR to the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

William M. Ely, for plaintiff in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

PER CURIAM.

Plaintiff in error was convicted of the offense of practicing medicine without first having obtained a certificate of qualifications, or license so to do, from the state board of health of the department of public welfare of the state, and prosecutes error to this court to review the record of his conviction.

The errors assigned are: That the information is insufficient to charge an offense; that the evidence is insufficient to sustain a conviction; and errors in the giving and refusing of instructions.

A majority of the judges of the court are of the opinion that all of the questions presented for review are controlled and determined by the rulings of this court in *Harvey v. State,* 96 Neb. 786, and *Carpenter v. State,* 106 Neb. 742. Each of the rulings of the district court, of which com-

plaint is made, is sustained by the rulings in the above cited cases.

No prejudicial error appears, and the judgment of the district court is therefore

AFFIRMED.

DEAN and HOWELL, JJ., do not agree that the record presented brings the instant case within the rules announced in the cases cited in the majority opinion, and therefore dissent.

JOHN HEISER ET AL., APPELLEES, V. EMMA BREHM ET AL., CROSS-APPELLANTS: HENRY HEISER, APPELLANT.

FILED OCTOBER 8, 1928. No. 26132.

1. **Deeds**: CONSTRUCTION. Under section 5594, Comp. St. 1922, in the construction of every instrument conveying real estate, it is the duty of courts of justice to carry into effect the true intent of the parties so far as such intent can be collected from the whole instrument and so far as such intent is consistent with the rules of law.
2. **Partition** will not lie in violation of restrictions imposed by the grantor in the terms of the trust created by him.
3. **Partition**: TRUST ESTATES. Where a trust deed grants active trust powers to the trustee, his successors and assigns, for the use of beneficiaries named in the trust deed, with power to pay the rents and profits of the land to the beneficiaries and to sell and convey the land at such time and on such terms as his judgment and discretion deem expedient, where the trustee accepts the trust and dies before carrying out in full the terms of the trust, it is error for a court to order a partition of the land at the instance of some of the beneficiaries and over the objection of other beneficiaries who pray that a successor in trust be appointed to carry out the provisions of such trust deed.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed, with directions.*

Henry Meier, Guardian ad litem, for appellant.

Meier & Meier, for Emma Brehm et al., cross-appellants.

Wilmer B. Comstock and *T. F. A. Williams, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an action in equity. The plaintiffs, as beneficiaries under a trust deed, secured a decree ordering partition of the farm land in Lancaster county described in the trust deed. Henry Heiser, an incompetent, one of the defendants, resisted partition and appeals.

The interests of all of the parties arise from Peter Heiser, their father, who died on April 26, 1926. On September 30, 1919, he made a will, which was probated after his death, by the terms of which he gave the home in Lincoln and $10,000 to his daughter, Christine, and the rest of his estate in equal shares to his eight children, Conrad, John, Henry, Nick, Katherine, Emma, Lizzie and Christine. Some years later, under date of June 18, 1925, he executed and delivered to his son, Conrad Heiser, as trustee, and his successors and assigns, a trust deed to the 160-acre farm in question for the use and benefit of his eight children. The trust deed gives Conrad Heiser as trustee complete and absolute control and supervision of the farm, with directions to receive the rents and profits and to pay them over annually to the beneficiaries, less the taxes and expenses; it grants to the trustee the power to sell the land for the best sum and upon the best terms he is able to obtain when in his judgment he deems it expedient to sell; it empowers the trustee to execute whatever instruments are necessary to consummate the sale and to convey an absolute fee simple title to his grantee; and it directs the trustee to divide the net proceeds, share and share alike, among the eight beneficiaries.

Without having completed the trust, and while still seised of the title to the land, Conrad Heiser died, on or about June 2, 1926, leaving a widow and four children, who are parties to the suit. All of the persons legally interested

are parties, all are over 21 years of age, and all are competent except Henry Heiser, who is represented by his guardian and by a guardian *ad litem*.

In the petition it was alleged that by deed dated June 18, 1925, Peter Heiser conveyed the land in fee simple to his eight children as tenants in common; that one of them, Conrad Heiser, has departed this life, leaving his widow and children to take his undivided one-eighth; and plaintiffs pray for equitable partition of the land among the parties or for partition sale by a referee. By answers and cross-petitions certain of the defendants set up the deed of June 18, 1925, alleging that it created an active express trust, that thereunder Conrad Heiser received rents, profits and income from the land and died before he had accounted to the beneficiaries; that after Conrad's death the plaintiffs in this action received rents and profits from said real estate and neither they nor Conrad Heiser's heirs have ever accounted for such income; wherefore the defendants prayed that the prayer of the petitioners be disallowed and that a suitable trustee be appointed by the court to carry out the trust under the direction of the court. By answer and cross-petition the daughter Christine Heiser, whose $10,000 bequest in her father's will would be affected by his later trust deed, alleged that the trust deed to Conrad was personal and ceased on his death, and that such real estate should become a part of the estate of Peter Heiser, to be distributed under his will. Issues were fully joined. On the trial the court found that the parties were the owners in fee simple, each being the owner of a definite undivided interest in the land. The court appointed a referee, ordered partition and directed a report thereof to be made at that term of court.

There is no particular variance in the facts alleged and the facts proved. The position of appellees as stated in their brief is that the only question involved in this appeal is whether the beneficiaries named in the trust deed are entitled to have partition of the land described therein. The position of the appellants goes a little further by tak-

ing the stand that the district court had no power to decree partition, but that, under the prayer of appellants and under the facts as alleged and proved, the court should have appointed a successor in trust with directions to carry out the terms of the trust.

The appellees argue that it does not matter in what way, whether by partition or by the appointment of a successor trustee, the land is sold and the proceeds divided among the heirs; that either method will result in the carrying out of the intent of Peter Heiser as expressed in the trust deed. The appellants, however, take the position, in effect, that statutory partition may result in a division of the real estate among the interested parties rather than in a sale of the land and a distribution of the proceeds; and that the latter course, and that alone, was the true purpose and intent of Peter Heiser when he made the trust deed.

The court in this suit found that the parties were the owners in fee simple of the land, found their respective shares therein, ordered these shares confirmed, and ordered partition of the land and appointed a referee to make partition of the land into the requisite number of shares and to report the same at the present term of court. Under sections 9249 and 9251, Comp. St. 1922, if the referee should report to the court that physical division of the land among the parties according to their interests cannot be made without prejudice, then the court shall enter an order directing a sale of the entire premises. The effect of these provisions of the statute makes it uncertain whether the land will be divided physically among the beneficiaries or will be sold in bulk.

It seems clear from the terms of the trust deed that it was the intent of Peter Heiser that the trustee should sell the land and distribute the proceeds of the sale, including the net rents and profits, among the beneficiaries. It seems equally clear that his intent was that the trust should not lapse, for he referred in the deed to "Conrad Heiser and to his successors and assigns." Section 5591, Comp. St. 1922, says: "Every conveyance of real estate shall pass

all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Section 5594, Comp. St. 1922, provides: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." It was provided in the trust deed that the trustee should use his "judgment and discretion" as to the time of sale, that when in his judgment and discretion he deems it expedient to sell the land "he shall sell the same for the best sum and upon the best terms he is able to obtain." It seems to us contrary to the express intent of Peter Heiser, the grantor, that it was ever contemplated by him that a court should order involuntary partition or public and statutory sale of the land he deliberately put in trust and clothed his trustee and successors with full power to sell at private sale when and on terms deemed expedient by such trustee. This intent we gather from the whole instrument, and, under section 5594, heretofore quoted, we must follow it unless it is not "consistent with the rules of law."

Section 9238, Comp. St. 1922, provides: "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." In *Wicker v. Moore*, 79 Neb. 755, we held that partition will not lie in violation of restrictions imposed by the grantor in the terms of the trust created by him. In that case we declared: "And it has been expressly held that, where the will shows that the testator did not contemplate a division of the trust property, it should not be divided. *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Blake v. Blake*, 118 N. Car. 575." Under our statute requiring intent to be derived from a deed, cases involving construction of wills devising real estate are applicable to construction of deeds. *Arthur v.*

Arthur, 115 Neb. 781, 786. We have held that only a joint tenant or tenant in common of real estate can maintain an action for its partition. *Phillips v. Dorris*, 56 Neb. 293; *Hurste v. Hotaling*, 20 Neb. 178, 182; *Barr v. Lamaster*, 48 Neb. 114.

The trial court held that each of the parties to the suit was the owner of an undivided interest in said lands. In this we think he erred, for even if, on the death of the trustee, Conrad Heiser, the legal title would not be held in abeyance, but would temporarily vest somewhere—whether in the heirs of Conrad Heiser or in the beneficiaries under the trust deed, we do not find it necessary to decide here—such title would be defeated by the paramount title proved by the trust deed on the trial in the district court. We base this upon the general principles of law relating to the intent of the grantor and upon section 9275, Comp. St. 1922, which says: "The judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject, however, to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common." The question of title of the successful parties below was resisted by the appellants. The purpose of the appeal is to determine whether the trial court was right in that regard. We think that it erred in finding that the parties were tenants, either joint or in common, of the lands, if that was the effect of his judgment that they each held an undivided interest as owners of the land, and that, in the face of the paramount title evidenced by the trust deed, it erred in ordering a partition of the land. We are of the opinion that, where a trust deed grants active trust powers to the trustee, his successors and assigns, for the use of beneficiaries named in the trust deed, with power to pay the rents and profits of the land to the beneficiaries and to sell and convey the land at such time and on such terms as his judgment and discretion deem expedient, where the trustee accepts the trust and dies before carrying out in full the terms of the trust,

it is error for a court to order a partition of the land at the instance of some of the beneficiaries and over the objection of other beneficiaries who pray that a successor in trust be appointed to carry out the provisions of such trust deed. In this case the court should have granted the prayer of the cross-petitioners and should have appointed a successor in trust to Conrad Heiser with directions to carry out the terms of the trust deed. Such a judgment would have insured the carrying out of the true and plain intent of Peter Heiser when he executed and delivered the trust deed, intending that Conrad Heiser or his successors would care for and dispose of this land in accordance with the grantor's plans.

For the reasons stated, the judgment of the district court is reversed, with instructions to grant the prayer of the appellants and to appoint a successor in trust under the deed, with directions to secure an accounting of the profits from the land and otherwise to carry out the terms of the trust as defined in the deed.

REVERSED.

FRANK J. CLEARY, RECEIVER, APPELLANT, V. FIDELITY & DEPOSIT COMPANY OF MARYLAND, APPELLEE.

FILED OCTOBER 8, 1928. No. 26573.

1. **Banks and Banking:** GUARANTY FUND: DEPOSIT OF COUNTY FUNDS. When a county treasurer makes a deposit of public funds in a state bank, the latter is liable to him for the amount of the deposit; and, if the deposit is made under circumstances which do not transgress the provisions of the guaranty fund law, then, on the failure of the bank, he is entitled to have the claim for the deposit adjudged preferred and payable from the depositors' guaranty fund.
2. ———: ———: LIABILITY. The depositors' guaranty fund is solely a creature of statute. Ordinarily, it can be augmented, replenished or reimbursed, and can be drawn upon for the payment of claims, or disbursed, only to the extent and in the manner provided by statute.
3. ———: ———: SUBROGATION. The only statutory subroga-

tion authorized to augment or replenish the depositors' guaranty fund is that provided by section 8035, Comp. St. 1922, and the subrogation therein provided is limited to the assets of the bank.

4. ———: ———: DEPOSIT OF COUNTY FUNDS. "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund." *State v. People's State Bank*, 111 Neb. 136.

5. ———: ———: ALLOWANCE OF CLAIM: RES JUDICATA. Where a county treasurer has presented to the district court a claim against a failed state bank and procures allowance of the claim as preferred and adjudged payable from the depositors' guaranty fund, and the judgment of the district court is not appealed from, the right of such treasurer to have his claim paid out of the guaranty fund has become *res judicata*.

6. ———: ———: LIABILITY. Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of its capital stock, but under circumstances which do not transgress the provisions of the guaranty fund law, and the bank fails, while the treasurer may be liable upon his official bond, such liability is secondary to that of the depositors' guaranty fund. Under such circumstances, as between the surety on the treasurer's bond and the guaranty fund, the latter is primarily liable.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Tibbets, Lambe & Hewitt, Butler & James and *Schaper & Runyan*, for appellant.

Gaines, McGilton, Van Orsdel & Gaines, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

This action is brought by the receiver of the Berwyn State Bank against the surety on the official bond of a former county treasurer of Custer county, to recover, for the use and benefit of the depositors' guaranty fund, the sum of $44,500, and interest thereon, which amount, pur-

suant to a judgment of the district court for Custer county, had been paid from the guaranty fund to the county treasurer, to reimburse him for public funds on deposit in the Berwyn State Bank at the time it failed, in December, 1922.

Plaintiff asserts the right to recover on two grounds: (1) That the guaranty fund commission is entitled to be subrogated to the rights of Custer county against the county treasurer and the surety on his official bond; (2) that the depositors' guaranty fund was injured by the treasurer's illegal use of county funds to bolster up a bank in which he was a stockholder, and that the treasurer and the surety on his official bond are liable for such injury. The county treasurer was named as a defendant, but he was neither served with process nor made appearance in this action. The defendant surety on the treasurer's official bond answered denying liability. A trial of the issues presented by the pleadings resulted in judgment for defendant, and plaintiff has appealed.

Plaintiff contends that the judgment should be reversed because it is not supported by the evidence and is contrary to law. It is contended that the treasurer was a wrongdoer, in this, that he deposited the public funds in his custody in a bank in which he was a stockholder, for the purpose of bolstering up the bank and to enable him and his friends to borrow funds from the bank; that the treasurer was a wrongdoer in depositing public funds in the bank in excess of 50 per cent. of its capital stock and without the bank having been designated by the county board as a depository of public funds; and that it follows that the treasurer and the surety on his official bond became liable to the county for any of the public funds lost by reason of the wrongful act of the treasurer. It is further contended that the treasurer and the surety on his official bond were primarily liable to the county for any loss of public funds; that the depositors' guaranty fund was liable only secondarily, and that, the guaranty fund having made good the loss to the county, it is entitled to be

subrogated to the rights of the county and recover against the treasurer and the surety on his official bond.

If the facts are as contended by plaintiff, does it necessarily follow that he may recover in this action? It may not be out of place to consider the relationship and the liability of the surety on the treasurer's bond and the guaranty fund with respect to the deposit in question. When a county treasurer makes a deposit of public funds in a state bank, the latter is liable to him for the amount of the deposit; and, if the deposit is made under circumstances which do not transgress the provisions of the guaranty fund law, then, on the failure of the bank, he is entitled to have the claim for the deposit adjudged preferred and payable from the depositors' guaranty fund.

In the body of the opinion in *State v. Security State Bank,* 116 Neb. 223, 229, it was said: "That is, under the statute the guaranty fund is an independent entity, and only those who bring their right of recovery within the statutory limitations are entitled to share therein." The language there used was not meant or intended to hold that the depositors' guaranty fund was an artificial person, such as could sue or be sued. Such fund is solely a creature of statute. Ordinarily, it can be augmented, replenished or reimbursed, and can be drawn upon for the payment of claims, or disbursed, only to the extent and in the manner provided by statute. The guaranty fund commission is a governmental agency which administers the fund. The only statutory subrogation authorized to augment or replenish the fund is that contained in section 8035, Comp. St. 1922, and the subrogation therein provided is limited to the assets of the bank.

In the case of *State v. People's State Bank,* 111 Neb. 136, which involved the liability of the guaranty fund for a deposit, made by the same treasurer, in excess of 50 per cent. of the bank's capital stock, it was held: "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of the paid-up capital stock of said bank, the entire deposit is within the protection of the de-

positors' guaranty fund." The ruling in that case has been followed in subsequent cases. We are thus committed to the doctrine that, where a county treasurer, in violation of a statute, deposits public funds in a state bank in excess of 50 per cent. of its capital stock, such deposit is within the protection of the guaranty fund. In the present case the deposit was within the protection of the guaranty fund. In fact, it was so adjudged by the district court, and the guaranty fund commission caused the claim to be paid from the guaranty fund. That payment forms the very basis of this action. That judgment of the district court was unappealed from. The question of the right of the treasurer to have his claim paid out of the guaranty fund became *res judicata.*

But, what of the liability of the treasurer's bond? The surety on the bond was liable to the county if the treasurer failed to account for or pay over to the county any funds that properly came into his possession as county treasurer. It is possible that, had the county treasurer been unable to collect upon the deposit, the county might have collected from the surety on the treasurer's bond; but such surety would not be liable to the county if the treasurer collected and returned the money to the county. The liability of the surety on the treasurer's bond was a secondary liability. As between the surety on the treasurer's bond and the bank in which the deposit was made, the latter was primarily liable. If the bank was liable and the deposit was within the protection of the guaranty fund, the latter would be a guarantor and liable primarily as between it and the surety on the treasurer's bond. If the treasurer had failed to pay over money to the county, and the county had sued and collected from the surety on his official bond, the latter would be subrogated to the rights of the county, as against the treasurer, to the deposit in the bank, and if the surety on the bond had paid the amount of the deposit to the county treasurer, it would, in equity, be subrogated to the rights of the treasur-

er to recover from the bank, and also from the guaranty fund as a guarantor of the deposit.

In *Rogers v. National Surety Co.*, 116 Neb. 170, this court held: "The depositors' guaranty fund is a creation of statute, possessing such rights and subject to such liabilities as the legislature has provided; the liabilities thus imposed thereon are analogous to that of a 'guarantor' as distinguished from a 'surety.'" In that case it was further held: "Section 8035, Comp. St. 1922, construed, and *held* to limit by express terms the subrogation therein provided for the benefit of the depositors' guaranty fund, upon payment made to the creditors, to 'all the right of the creditors thus paid to participate in the assets of such bank.'" It thus appears that the right of the guaranty fund to subrogation is limited by statute to the right of the creditor to participate in the assets of such bank. It is apparent that the liability of the treasurer's surety was not an asset of the bank and does not come within the statutory provision awarding subrogation to the guaranty fund.

It was held by this court in *State v. Kilgore State Bank*, 112 Neb. 856: "The surety on a bond given by a state bank to secure a deposit of Indian money, such as is required by federal law, will ordinarily be subrogated to the rights of the depositor of such money—the United States by its proper agents—when no equity intervenes to bar such subrogation and when the surety has paid the depositor the amount due on such deposit." The situation in that case would be somewhat analogous to this if the surety on the treasurer's bond had paid the amount of the deposit to the county and had then sued to recover from the bank and the depositors' guaranty fund. According to the decision just cited, the judgment would have gone for the surety on the bond, as against the guaranty fund. If plaintiff's contention be sound, then we would have this anomalous situation: That the county treasurer could sue and recover from the guaranty fund the amount of his deposit in the bank, and, upon payment to him from the guaranty fund, the guaranty fund commission could, by proc-

ess of subrogation, turn around and sue and recover back the money so paid to the treasurer. The proposition seems absurd. This court declines to hold that the law requires such an absurdity.

We are of the opinion that the judgment of the district court is in strict accord with the former rulings of this court and is the only one that could have been properly entered. We find no error, and the judgment is therefore

AFFIRMED.

ROSE, J., dissents.

A. C. PALMER, APPELLEE, V. SAUNDERS COUNTY, APPELLANT.

FILED OCTOBER 8, 1928. No. 26442.

1. Master and Servant: WORKMEN'S COMPENSATION: RECOVERY. Where an employee receives an accidental injury arising out of and in the course of his employment, and his employer becomes possessed of knowledge thereof at the time or within a few days thereafter, and the injured employee makes claim of his employer for compensation within two months of the date of the injury, and lodges his claim for compensation with the commissioner within seven months from the time the injury was received, his right of recovery is not barred under sections 3056 and 3061, Comp. St. 1922.
2. ———: ———: ACTION: REVIVOR. Sections 3045, 3046, and 3067, Comp. St. 1922, construed, and *held*, that an action to recover compensation instituted by an injured employee and pending at the time of his death may be revived on motion by any one or more of those wholly or partially dependent upon him for support on giving bond as required, or by the administrator of his estate without bond. In such case, the pleadings should name the dependents and contain facts sufficient to bring such applicant or applicants for revivor within the above referred to sections, and the final judgment rendered at the conclusion of the trial should be within the facts pleaded and the law applicable thereto.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed, with directions.*

Slama & Donato, for appellant.

E. S. Schiefelbein, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

A. C. Palmer, an employee of Saunders county, lodged a claim for compensation with the commissioner on December 31, 1926, for an alleged accidental injury received by him on June 17, 1926, arising out of and in the course of his employment while operating the county's road maintainer on a public highway. At the time of such injury he was 59 years of age and was, and had been, receiving as wages the sum of $25 a week. Such claim was approved and an award entered of $15 a week for temporary total disability from July 5, 1926, until disability ended, and further ordered payment of medical and hospital expenses, but without determining the amount of either. From this award the county appealed to the district court. After the issues were duly joined, and the case had proceeded to trial, and his and other testimony taken, to wit, on October 20, 1927, Palmer died leaving surviving his wife, appellee herein, and their two minor children, aged 10 and 16 years respectively, each and all being members of his household and wholly dependent upon him for support. On the application of such wife, the county consenting, the action was revived in her name, however without bond, without mention of such children, and without amendment of pleadings; trial proceeded to judgment, which was one affirming the award of the commissioner and fixing the amount of the medical and hospital expenses recoverable at $530.70, and in addition thereto allowed attorney fees in the sum of $250, and $768 as a penalty for waiting time; to reverse which the county appeals. The claimed errors, which we deem it necessary to determine, will be indicated as considered.

The entire record has received our most careful consideration, and from it we conclude that the challenge that the employee failed to serve or make claim on the county,

as required by law, is without merit, as the county, by and through its officers, had knowledge of the accident at the time or within a few days, and the employee notified the county of his claim for compensation within two months thereafter. Thus, section 3056, Comp. St. 1922, did not deny him recovery; and, as his petition was filed with the commissioner within one year after the alleged cause of action arose, neither did section 3061, Comp. St. 1922, deny such recovery.

It is further contended on the part of appellant that the judgment is contrary to law. The law applicable to the situation hereinbefore disclosed, so far as material to our present consideration, is as follows: Section 3046, Comp. St. 1922, provides, in substance, that the death of an injured employee, entitled to disability compensation, ends such disability; "but the employer shall thereupon be liable for the following death benefit in lieu of any further disability indemnity: If the injury so received by such employee was the cause of his death and such deceased employee leaves dependents as hereinbefore specified wholly or partially dependent on him for support, the death benefit shall be a sum sufficient, when added to the indemnity which shall at the time of death have been paid or become payable under the provisions of this article to such deceased employee, to make the total compensation for the injury and death equal to the full amount which such dependents would have been entitled to receive under the provisions of the next preceding section, in case the accident had resulted in immediate death; and such benefits shall be payable in the same manner and subject to the same terms and conditions in all respects, as payments made under the provisions of said next preceding section. No deduction shall be made for the amount which may have been paid for medical and hospital services and medicines or for the expenses of burial." The section referred to in the above quoted section is section 3045, which reads in part as follows: "If death results from injuries and the deceased employee leaves one or more dependents wholly dependent upon his earnings for support at the time of the

accident causing the injury, the compensation, subject to the provisions of the next following section (section 3046), shall be sixty-six and two-thirds per centum of the wages received at the time of the injury, but the compensation shall not be more than fifteen dollars per week or less than six dollars per week. * * * This compensation shall be paid during dependency, not exceeding three hundred and fifty weeks from the date of the accident causing such injury." As to the procedure in such case we have section 3067, Comp. St. 1922, which provides: "In case of death, where no executor or administrator is qualified, the said court shall, by order, direct payment to be made to such persons as would be appointed administrator of the estate of such decedent, upon like terms as to bond for the proper application of compensation payments as are required of administrators." Section 1293, Comp. St. 1922, as amended by chapter 73, Laws 1925, gives to the widow a preferential right of appointment as administratrix of the estate of her deceased husband.

As we have seen, the application for revivor was made by the widow, which, under the statutes above quoted, was proper. Yet she failed to mention the other dependents, as under this record she should have done. She did not tender, and neither did the court require her to give, a bond safeguarding the rights of the two minors; further, the judgment rendered is indefinite as to the length of time the weekly payments should continue; and this notwithstanding under the statutes such a bond is required, and such payments are limited to a period not to exceed 350 weeks. A fairly liberal construction of the above statutes, under the record before us, warrants the conclusion that, upon the death of the employee (husband and father), an administrator of his estate could have been appointed who, after qualifying, could have had the action revived in his name, as such, without giving an additional bond, or the dependent widow upon giving the required bond, or, on her failure to apply, either of such dependent children through their proper guardian might have, or either two or the three together could have, made the motion,

and, on compliance with the statute, had the action revived. However, in either case the pleadings should name the dependents and contain facts sufficient to bring such applicants for revivor within the statutes quoted. That is, the pleadings should contain all essential jurisdictional facts, as well as all facts necessary to reflect the true situation, and the final judgment rendered at the conclusion of the trial should be within the facts pleaded and the law applicable thereto. Neither the procedure nor the final judgment rendered in the instant case meets the above indicated statutory requirements. Hence, such judgment is contrary to law. The above conclusions as to who may revive the action in case of death of the injured employee are in harmony with our holding in *Coster v. Thompson Hotel Co.*, 102 Neb. 585.

This renders it unnecessary to further consider the evidence, or the other claimed errors presented. However, it may be well to state that we find that the issues as well as the evidence of the claimant, appellee, rendered the testimony sought to be elicited by questions 1008 and 1009, propounded by appellant, acutely material and competent, and prejudicial error was committed by the trial court in sustaining objections thereto. In this conclusion we are sustained by section 8841, Comp. St. 1922, as amended by chapter 74, Laws 1925.

The judgment of the trial court is reversed and the cause remanded for retrial, with directions to permit substitution or amendment of pleadings in conformity with this opinion.

REVERSED.

GOTTLIEB STORZ, TRUSTEE, APPELLEE, V. HENRY S. CLARKE, JR.: MYRTA E. CLARKE, APPELLANT: BURDETTE KELLEY, RECEIVER, CROSS-APPELLANT.

FILED OCTOBER 8, 1928. No. 25915.

1. **Homestead: CONVEYANCE.** A homestead of a married person cannot be conveyed or incumbered unless the instrument by

which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

2. ———: ———: VALIDITY: ESTOPPEL. Upon the facts stated in the opinion, it is *held* that Myrta E. Clarke was in no manner estopped to contest the validity of the instrument in suit, and that as to, and the extent of, the homestead interest of herself and husband embraced in the premises therein described such instrument was void.
3. Vendor and Purchaser: HOMESTEAD: POSSESSION: NOTICE. At the time the instrument in suit was delivered, the record title to the premises involved and described therein was in the name of Henry S. Clarke, Jr. The premises were occupied as the home of Clarke and wife. The plaintiff and those represented by him accepted the conveyance in good faith, relying on the record title, and in ignorance of an unrecorded deed conveying the premises from Clarke to his wife. *Held*, under these circumstances, the fact that Myrta E. Clarke, the wife, was, together with her husband, in joint occupancy of the premises as a family home did not impart to the plaintiff and his associates notice of the fact that she claimed any title to the property or any interest therein other than right of homestead, and such rights as would vest in her by virtue of her husband's ownership, as evidenced by the record title.
4. Homestead: EXTENT: INVALID MORTGAGE. The statutory homestead, as between mortgagors and mortgagee of a real estate mortgage invalid as to homestead interests of the mortgagors included therein, is unlimited as to value and is properly described as a "quantity of land not exceeding 160 acres, not included in any incorporated town, city or village, or a quantity of land, not exceeding in amount two lots, being within an incorporated town, city or village."

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

Morsman & Maxwell, for appellant.

Keller & Keller, for cross-appellant.

Smith, Schall, Wright & Sheehan, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and LANDIS, District Judge.

EBERLY, J.

This is an action in equity commenced in the district court for Douglas county, Nebraska, by Gottlieb Storz,

trustee, plaintiff, against Henry S. Clarke, Jr., and Myrta E. Clarke, husband and wife, and other defendants named. The purpose of the proceeding was to foreclose as a mortgage a certain warranty deed purporting to have been executed by the Clarkes and to convey to plaintiff trustee lots 13, 14, 15 and 16, in block 13, West End addition to the city of Omaha, Nebraska, and also that part of the alley vacated between lot 13 and lots 14, 15 and 16, which, together with other securities, were delivered, accompanied by a letter signed by Henry S. Clarke, Jr., alone, and which set forth that the securities accompanying the letter were to be by such trustee "held in trust for the benefit and use of B. F. Marshall, G. Storz, E. F. Folda, E. P. Meyers, O. H. Barmettler and A. W. Gordon, to protect against any loss that may accrue to them by reason of a guaranty," etc. It is alleged in the petition that this instrument, though in the form of a warranty deed, was delivered to the plaintiff as security for any payments which plaintiff and certain associates named in the petition might be compelled to make because of the execution by them of a certain guaranty in writing described therein as being for the benefit of Henry S. Clarke, Jr., and others. The amount of such payments which the beneficiaries named in this instrument were compelled to make, which were admitted by all parties, was also set forth in the petition as follows: "That * * * this plaintiff and those for whom he held said deed in trust as security * * * paid, and caused to be paid, were required to pay and did pay * * * the sum of $52,728.79, in full payment, * * * which amount was included" in said guaranty. In addition thereto there is contained in this pleading the usual allegations and prayer.

It seems the Clarkes answered separately; that one Burdette Kelley, as receiver of the First National Bank of Torrington, Wyoming, said to be claiming under a judgment rendered against defendant Myrta E. Clarke for $19,540 on May 27, 1926, intervened.

Certain cross-petitions and answers by other defendants, not necessary to the discussion of the questions con-

trolling in this case, were filed, and plaintiff joined issues by filing the necessary replies.

Trial was had to the court, and at the conclusion of this hearing a decree was entered which, so far as necessary to be considered here, may be summarized as follows: Determined the amount expended by plaintiff and associates as necessitated by the terms of the written guaranty which had been executed by them for which the instrument in suit was given to secure, and that no part of such sum had been repaid; that the instrument in suit, though in the form of a deed, was given as security and should be treated as a mortgage; that the real estate involved in suit was, at the time of the execution and delivery of plaintiff's deed, occupied by Henry S. Clarke, Jr., and his wife, with their family, as a homestead; that the record title to said property was in the name of Henry S. Clarke, Jr., but that prior thereto and on or about November 12, 1920, said Henry S. Clarke, Jr., executed and delivered to Myrta E. Clarke, his wife, a deed conveying to her said premises, but which deed was unrecorded at the time of execution and delivery of the deed to Gottlieb Storz, and was not recorded until December 1, 1924; that the guarantors in whose behalf the plaintiff sues had no knowledge of the existence of the deed from Henry S. Clarke, Jr., to Myrta E. Clarke, until after the deed filed by Henry S. Clarke, Jr., and Myrta E. Clarke to plaintiff had been accepted by him and recorded.

The district court further found that, at the time Myrta E. Clarke signed the deed in controversy here, it was in blank except as to the printed portion thereof; that she did not give Henry S. Clarke, Jr., authority to fill in the blanks above her signature, but that she knew and understood a mortgage was to be executed by Henry S. Clarke, Jr., and herself, and delivered to Gottlieb Storz, trustee, as security for any loss that the guarantors might sustain on account of the guaranty herein mentioned; that Henry S. Clarke, Jr., subsequently filled out the blank form by writing in a description of the property, signed the same,

and his acknowledgment was taken thereto by a notary public in his office, but that said deed was not acknowledged before the notary public by Myrta E. Clarke; also that when said deed was delivered to Gottlieb Storz by Henry S. Clarke, Jr., it did not contain the name of the grantee, but that accompanying the deed was written authority, signed by said Henry S. Clarke, Jr., alone, authorizing Gottlieb Storz to write in his name as grantee in such deed, which was complied with; that said instrument did not in any manner affect a $2,000 homestead interest in the premises vested in Myrta E. Clarke, but that the Clarkes are estopped from in any manner otherwise challenging the legality of the deed (except as to homestead), and that the plaintiff is entitled by reason thereof to have a first lien on the premises for the amount of payments made pursuant to the terms of the guaranty, but subject to a $2,000 homestead in said property belonging to the defendants Clarke. The priority of the liens claimed by the other defendants are determined, and the decree of foreclosure was entered as above indicated. Myrta E. Clarke appeals. Receiver Kelley now appears here as a cross-appellant.

As an appeal in equity the case here is for trial *de novo*. Preliminary to the consideration of the questions before us, and as a background in connection with the disputed questions of fact and law to be hereafter considered, it may be said in passing: That the record in this case discloses that this litigation finds its source in the Corn Exchange National Bank of Omaha, Nebraska; that during its active career this institution was popularly known as a "cattle bank," which signifies that it was largely devoted to financing western cattlemen; that Henry S. Clarke, Jr., entered its service as one of the managing officers in the spring of 1912, and previous to this time this institution had never declared a dividend upon its stock; that at the time Clarke entered its service he was part owner of, and exercised practical control of, six state and national banks situated in the "cattle country" in western Nebras-

ka and Wyoming, known as the "Clarke banks." These banks were also largely interested in financing the cattle industry.

It was largely because of these connections that Clarke's services were secured by the Omaha institution. After Clarke became connected with the Corn Exchange National Bank the Clarke banks, it appears, were operated as "feeders" for that institution. The new relation proved lucrative to both. In addition to this line of banks, other like connections were made with similar institutions. Under the new system the deposits of the Omaha institution were increased; it commenced the payment of dividends which, as time passed, were substantially increased and for many years its earnings aggregated in the neighborhood of 20 per cent. per annum. This business involved carrying and handling large lines of paper from the western banks, for under the new policy the Omaha institution secured the patronage of many other financial institutions in addition to the Clarke banks.

The method of transacting this business was peculiar to the industry in some respects. It would seem that the cattle industry, as then carried on, required financial accommodation in excess of those possible to furnish by the Clarke banks and other western institutions under the limitations imposed by the banking laws. As a result of the situation the evidences of indebtedness were taken by these western banks in two forms: One, in an ordinary note payable to the order of the bank's corporate name and which, when received by the Omaha institution, necessarily bore the corporate indorsement as such; the other was taken payable to the individual names of the officers of such feeder institution, and when turned over to the central institution at Omaha bore the individual indorsement of the payee named therein. It appears, however, that all of this paper properly represented the business of the "feeder banks." The latter received the proceeds derived from the paper thus discounted and sold, and reaped the profits thereby. The transaction in the second

form was, in truth, a loan of individual credit by the bank officer in his individual capacity to the corporate institution that such person represented in the transaction. Likewise, as the corporate bank had received the proceeds and reaped the profits it was under moral obligation to pay, in the event such indorsee was called upon to fulfil the terms of his contract. It is quite plain that this obligation of the bank involved to pay would not be subject to question so long as the bank itself was a solvent institution, and the officer who had loaned his credit in the form of an individual indorsement was one of the controlling powers in the institution involved.

There is no question raised as to the fact that the records of the Corn Exchange National Bank were accurate, properly kept, and reflect a true situation of its affairs.

The course of business hereinbefore outlined had existed for years. During this time the plaintiff herein and his associates represented by him, as trustee, were directors of this institution. The record in evidence discloses their express approval of the several notes thus received by the Corn Exchange National Bank.

The business grew to such volume that in September, 1924, the Corn Exchange National Bank had in its note case approximately one million dollars in notes which originated in the territory of the Clarke banks, and which were, by the Corn Exchange National Bank, received from them in the course of business above outlined.

In the fall of 1924 the results of the continued deflation in the cattle industry, commencing in 1920, culminating in the failure of a large number of banks in Nebraska and Wyoming and elsewhere, were such as to cause serious concern to the managing officers of the Corn Exchange National Bank. The reduction of live stock prices had rendered debtors, theretofore unquestioned, insolvent, caused the solvency of others to be a matter of doubt, and created a condition whereby many obligations, whose makers were actually solvent, were temporarily uncollectable. The best judgment of those interested was that an

extended period of time was required in order that such assets might be collected. In view of the relation that existed between the Clarke banks and the Corn Exchange National Bank, it was almost vital to the latter that the former be maintained as going, solvent, institutions.

A careful survey of the conditions of the loans of the Clarke banks was made, at the conclusion of which it was determined that the creation of a revolving fund of $300,000 for use during a period of not less than three years, to be used in the removing and handling of questioned assets in the latter institutions, would enable this string of banks to successfully weather the crisis.

There appears to be a conflict in the evidence as to whether it was intended that this fund, when raised, should be used for the direct relief of the Corn Exchange National Bank or not. But in view of the course of business whereby the million dollars in notes, then in its note case, would have to be cared for by those from whom it received them, it makes but little difference whether the Corn Exchange National Bank was to be a direct beneficiary or not. Had the fund been administered even in accord with the claims of the trustee herein, it would have resulted in manifest benefits to the stockholders of the Corn Exchange National Bank.

At all events, and as a result of a number of conferences at different places, and in the presence of different parties, an agreement was finally made between Henry S. Clarke, Jr., his wife and others, pursuant to which Gottlieb Storz and those associated with him executed a written guaranty to the Continental & Commercial National Bank of Chicago in the sum of $300,000, and the latter institution thereupon loaned to one Eaton, upon promissory notes indorsed by Clarke with recourse and executed by Eaton, and who was officiating as trustee of the fund as a first installment, the sum of $100,000. The agreement which was made preliminary to the execution of the written guaranty it appears was part in writing and in part oral. Excluding the evidence in the record which was ad-

mitted as not binding on Mrs. Clarke, it fairly appears that, during the negotiations which resulted in the execution of the guaranty, Mrs. Clarke was informed that if she would execute a deed or mortgage on her home which she was then occupying as such, and of which she was the owner in fee by virtue of an unrecorded deed to Gottlieb Storz, the latter and those associated with him would guarantee, and by this means secure, a loan of $300,000 to be used as a revolving fund for the maximum period of three years for the purpose of removing from the assets of the Clarke banks questioned assets, and handling the same to the best advantage.

On the faith of this representation and upon the faith of the oral agreement made in her presence to that effect, at her home in September, 1924, Myrta E. Clarke signed her name, in the presence of her husband only, to a Huffman General Supply House, form No. 100, warranty deed. At the time she affixed her signature to this paper, it was naught but a form; none of the blanks had been filled out, nor any of them ever filled out in her presence or pursuant to her written authority. She never appeared before any notary public and acknowledged the execution of this paper as an instrument or a deed. Subsequently her husband proceeded to the offices of the Corn Exchange National Bank some distance from the home. There, in the absence of his wife, and without her presence at any time before the notary, and without any actual acknowledgment by her to the completed instrument, and without any written authority whatever from her, he filled out a portion of the blanks and signed the same. Then, stepping into a cage occupied by the assistant cashier of the institution, who was also a notary, the latter at his sole request then filled out the certificate of acknowledgment, reciting falsely therein that "Henry S. Clarke, Jr., and Myrta E. Clarke, husband and wife, came before" him and acknowledged the same to be their voluntary act and deed. As to Mrs. Clarke this certificate is false in every respect. The property affected by its terms was admittedly a homestead.

"The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Section 2819, Comp. St. 1922.

It is thought sections 2451, 2550, Comp. St. 1922, are also applicable to the situation presented.

The only conclusion possible, in view of the undisputed facts and the terms of our statutes, is that the instrument before us is void as to the homestead. This conclusion is supported by many well-considered cases in this jurisdiction. *Anderson v. Cusack,* 115 Neb. 643; *Wilson v. Wilson,* 83 Neb. 562; *Lichty v. Beale,* 75 Neb. 770; *Meek v. Lange,* 65 Neb. 783; *Anderson v. Schertz,* 94 Neb. 390.

But it is insisted that the present case is one involving the doctrine of estoppel; that Mrs. Clarke is estopped by her act of signing a blank page, in view of the fact that it permitted completing, over her signature, what purported to be a valid instrument binding upon her.

It is not to be forgotten, however, that the facts in this record in no manner sustain the conclusion that Mrs. Clarke was guilty of fraud in the present transaction. The legal principle that fraud is never to be presumed, but must be clearly proved to entitle a party to relief on that ground, is so well established and so fundamental as to require the citation of no authorities to support it. Then, too, it must be conceded that it affirmatively appears that, at most, Mrs. Clarke's dereliction may be summed up as "culpable negligence" in entrusting to her husband a blank with her name affixed thereto. But even if this be true, it does not follow that, as the sole or proximate result of the culpable negligence in question, Storz and his associates were deceived, and therefore the basis of the doctrine of estoppel, as applied in the ordinary case, might be established. Had this deed in question been fully completed in its execution and all of its details so that when tendered to Storz it appeared a completed instrument, and that he relied upon it as such, the conclusion might be otherwise. However, when this instrument, on a blank sup-

plied for use to the trade as a general warranty deed, came into his hands as an instrument intended to accord security only, and not only lacking "grantee," but without "consideration," then a blank (Comp. St. 1922, secs. 5662, 5663) with description incomplete, with no terms of defeasance, or terms identifying and limiting the liability to be secured thereby, appearing therein, with actual knowledge on his part that the subject-matter was a homestead, with the only authority for its completion a letter signed, purporting to be signed, and authorized by the husband only, it would seem that the basis for the contention that estoppel is applicable in the case in behalf of plaintiff wholly disappears. It is thought that the very appearance presented by the deed itself at that time fully disclosed to him that Mrs. Clarke had been indeed guilty of "culpable negligence in connection therewith," hence he could not be misled thereby. At all events, he never relied upon a completed instrument delivered by the Clarkes, but his reliance, under the facts in the case, must be deemed to have been based upon the authority conferred upon him to complete the instrument thus placed in his possession. This necessitated the exercise of the powers of agency. The subject-matter of the transaction was one in which Storz had an individual interest. He knew the parties and the peculiar nature of the subject of the transaction, a homestead, and that in the completion of the instrument he was necessarily acting for both parties interested therein. He thus occupied, of necessity, with reference to Mrs. Clarke, the position of an agent dealing with his principal with reference to matters in which his individual interest conflicted with that of his principal. The knowledge of this fact is imputable to his associates for whom he subsequently became trustee. They, with him, were the joint beneficiaries of his act. The situation revealed in the record, at least, imposed upon Storz the duty of absolute good faith, and to conform strictly to the limitations imposed by his actual authority. *Drury v. Foster*, 2 Wall. (U. S.) 24.

"An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen.' It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." 1 Mechem, Agency (2d ed.) 527, sec. 743.

Has the plaintiff established that the nature and extent of authority he received as to Mrs. Clarke justified the filling up of the blanks in the printed form at the time and in the manner it was done? At that moment, through no fault of Mrs. Clarke, the guaranty itself, to secure the $300,000 revolving fund, had been prematurely terminated by the voluntary acts of certain guarantors, and at that time the plan of aiding the Clarke banks wholly abandoned.

Thus, the consideration which, in fact, constituted the condition upon which Mrs. Clarke had orally agreed to secure by use of her home the guarantors against loss because of having executed the guaranty necessary to secure the $300,000 fund for the period of three years had wholly failed. Through this premature termination of this guaranty, and the premature abandonment of the plan of aiding the Clarke banks, all possibility of substantial value accruing therefrom to the Clarkes had utterly vanished. In short, the guarantors had not kept faith and had not complied with the promise to the surety.

True, certain of the guarantors in their evidence deny that the 3-year period formed any part of their prior agreement as the matter was discussed with and by them. But Mr. Gordon, who was a director of the Corn Exchange National Bank and one of the guarantors, testifies that the agreement among the six guarantors, indeed made

prior to the signing of the deed in blank by Mrs. Clarke, and indeed prior to the written guaranty to the Chicago bank, was that their engagement involved a maximum of three years' time, and a maximum amount of $300,000, and that there was no time fixed that the guaranty should run or be kept good except as to the maximum of three years.

Nothing had been done toward completing the instrument now sued on by or in behalf of Storz until after all of the events just referred to had transpired. A demand or request was then made upon Henry S. Clarke, Jr., and upon the attorney of Myrta E. Clarke to complete this instrument. This demand was met with refusal on the part of both. After this refusal thus made, under Storz' direction the instrument in suit is further partly completed and based on this incomplete instrument upon which Storz as trustee, is now maintaining the present action for the benefit of all the signers of the guaranty to the Chicago bank including Gordon. This action is admittedly in the form permitted by statute. It is, in effect, an attempted enforcement of an alleged obligation in favor of the six guarantors as joint promisees.

In view of the form of the action brought and the substantial nature of the obligations sought to be enforced, it would seem that it must be considered as an action brought in favor of the guarantors jointly.

It would seem, therefore, that the knowledge of the original contract and of the situation possessed by any one of the joint obligees or promisees is imputable to all. 22 C. J. 351, sec. 404; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801; *Stephenson v. Perry*, 112 Neb. 294; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Parker v. State*, 8 Blackf. (Ind.) 321; *Shirk v. Brookfield*, 79 N. Y. Supp. 225.

In view of the total absence of the element of fraud, so far as related to Mrs. Clarke, the entire lack of actual authority to complete the deed when it was actually done by Storz, as trustee, and in view of the notice which the

surrounding circumstances, as well as the relation of the parties, imputed to Storz, as trustee, we feel there is no basis for the estoppel claimed.

It follows, therefore, that, so far as homestead rights and interest are vested in her as the wife of Henry S. Clarke, Jr., the same are wholly unaffected by the instrument in suit. *Betts v. Sims*, 25 Neb. 166; *Whitlock v. Gosson*, 35 Neb. 829; *Davis v. Thomas*, 66 Neb. 26; *Anderson v. Cusack*, 115 Neb. 643.

We have carefully considered the authorities cited in the able brief on behalf of the appellee, but in view of the facts disclosed in the present record we do not find them in point. Among others, *Pitman v. Mann*, 71 Neb. 257, is cited, but the opinion in this case contains language which, of itself, excludes the application of the doctrine announced in this case to the case at hand. In that opinion Ames, C., says in part: "The statute avoiding a conveyance or incumbrance of the homestead of a married person, without the signature of both husband and wife, was enacted with the evident purpose of protecting both of the parties to the marriage, and those persons composing their families and dependent upon them. During the lifetime of any of such persons it may be that a husband or wife, who alone has executed such an instrument, may successfully defend against it without the concurrence of his or her consort or the dependents of either; and it may even be that such a defense would be entertained if made by a sole survivor of the family, who had executed the instrument without fraud or concealment with respect to the homestead character of the lands, but neither of these questions is involved in this inquiry, or intended to be decided."

It follows then that, as applied to the statutory homestead, the instrument in suit is void.

At the time this instrument was delivered, however, it appears that the record title to the premises described therein was in the name of Henry S. Clarke, Jr. True, Myrta E. Clarke was, by virtue of an unrecorded deed,

the true owner thereof. The plaintiff and those represented by him, however, dealt with the situation in good faith relying on the record title and in ignorance of the unrecorded deed. Under these circumstances the fact that Myrta E. Clarke was, together with her husband, in joint occupancy of the premises as a family home did not impart notice to Mr. Storz and his associates of the fact that she claimed any title to the property or any right therein other than right of homestead, or such rights as would vest in her by virtue of her husband's ownership. *Kirby v. Tallmadge*, 160 U. S. 379; *Townsend v. Little*, 109 U. S. 504; *Thomas v. Kennedy*, 24 Ia. 397; *Rendleman v. Rendleman*, 118 Ill. 257; *Garbutt & Donovan v. Mayo*, 128 Ga. 269; *Rankin v. Coar*, 46 N. J. Eq., 566; *Atwood v. Bearss*, 47 Mich. 72; 5 Thompson, Real Property, 334, sec. 4249.

In its decree the district court determined that the instrument in suit was binding upon Henry S. Clarke, Jr., and he, not having appealed, is concluded by that determination. Mrs. Clarke in her appeal presents solely the question of homestead rights, and we will now address ourselves to the limits and extent of the homestead as determined and defined by our statutes.

This court is committed to the doctrine that, as between the mortgagor and mortgagee, the homestead means something more than, and different from, the $2,000 exemption which the statute allows the homestead claimant as against the claims of creditors. It means the actual home of the family including the lands and buildings constituting the same, and the possession and ownership of all of which may be successfully defended by either husband or wife during the marriage state against independent acts of either, and against joint acts of either or both. *Anderson v. Cusack*, 115 Neb. 643; *Anderson v. Schertz*, 94 Neb. 390; *Davis v. Merson*, 103 Neb. 397; *Meisner v. Hill*, 92 Neb. 435.

While it may be said that *Meisner v. Hill, supra*, left the extent of the homestead as between others than credi-

tors and debtors a matter of doubt, yet the invariable course of decisions of this tribunal since *Meisner v. Hill, supra,* was announced has been to limit the physical extent of the homestead as between others than judgment creditors and debtors to a "quantity of land not exceeding 160 acres * * * not included in any incorporated town, city or village, or, * * * a quantity of * * * land, not exceeding in amount two lots, being within an incorporated town, city or village." This, as a fact, is accorded express recognition in *Campbell v. Gallentine,* 115 Neb. 789.

In the present case the premises are made up of lots 13, 14, 15 and 16, including a vacated alley adjacent to and between lot 13 and the other lots mentioned. Upon vacation the land comprised in the vacated alley accreted in equal portions to the adjacent lots. The dwelling house is situated on lots 14 and 15. The barn and garage in connection therewith are situated on parts of lots 13 and 16.

The application of the principles hereinbefore announced to the situation results in a finding that lots 14 and 15, and the south half of the vacated alley adjacent thereto, constitute the statutory homestead of the Clarkes. As to these premises last described the instrument in writing, which forms the basis of plaintiff's petition, is absolutely void, and Mrs. Clarke is entitled to a decree quieting the title of lots 14 and 15 and part of alley pertaining thereto against the same.

On the other hand, the remainder of the tract, viz., lots 13 and 16 and part of the vacated alley forming no part of the statutory homestead are subject to the decree entered in the district court for Douglas county, Nebraska, with the priorities as therein determined, but without deduction as to homestead rights of the Clarkes, and, that as against all judgment creditors in suit the rights of the Clarkes in said homestead are limited to the sum of $2,000.

The judgment of the district court is therefore reversed

and the cause remanded, with directions to enter a decree in accordance with this opinion.

REVERSED.

CHARLES H. BAKER, APPELLEE, V. FRANK FARNSWORTH ET AL.: GERTRUDE D. REED, APPELLANT.

REPORTED OCTOBER 8, 1928. No. 25394.

1. **Attorney and Client: PROFESSIONAL ETHICS.** Where A and B are adversely interested in the subject-matter of a pending action between them, an attorney, after having served A, will not be permitted to represent B in the pending litigation between A and B, where the same adverse interests are involved.
2. ———: ———. A litigant in a suit in equity will not be permitted to secure the fruits of a decree in his favor, obtained for him by an attorney whom he knows to have previously represented his adversary, over objection of adversary, in the subject-matter before the court.
3. ———: ———: APPEAL: REVERSAL. A decree in equity secured, over objection, by an attorney for the successful litigant with knowledge of a prior employment of the same attorney by his adversary, where the subjects involved are the same or inseparably related, will be set aside and the cause remanded for trial without considering other claimed errors going to the merits of the case.
4. ———: ———. Public policy forbids an attorney from representing a party to litigation, over objection, where the subjects involved are the same or inseparably related, against an adversary whom the attorney previously served.

APPEAL from the district court for Kimball county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Gertrude D. Reed and *S. E. Torgeson,* for appellant.

Ballard & Anderson, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

HOWELL, J.

This is a real estate mortgage foreclosure suit on ap-

peal. In 1919 one Farnsworth mortgaged lots to one Van Lanningham for $1,500, the mortgage being duly recorded. Van Lanningham shortly afterward, it is claimed, sold the note secured by the mortgage to Charles H. Baker, the plaintiff and appellee. No assignment of the mortgage appeared on record. Appellant, Miss Reed, owned a judgment against Farnsworth procured by assignment.

In 1923, Miss Reed employed W. J. Ballard, who appears in this case as attorney for appellee, to bring about an execution sale of the lots on the Reed judgment. The lots were bid in by Ballard as appellant's attorney, for her, for $25. The sale was confirmed February 4, 1924, and the sheriff's deed was delivered to appellant about that time. Early in 1925 appellee, Baker, employed Ballard to foreclose his mortgage. The necessary petition was filed in April, 1925, making the mortgagor, mortgagee, Farnsworth and wife, and appellant defendants, all of whom defaulted except appellant. Appellant's answer challenged the validity of the mortgage, charged that it was a sham and that it had been duly released of record by Van Lanningham in June, 1923, several months prior to the sale of the lots on her judgment.

Appellee, to meet that defense, contended that the appellant procured the release to the mortgage from Van Lanningham after he had assigned it and the note secured thereby to appellee with knowledge on the part of appellant of the previous assignment. Notice of the assignment of the mortgage and note was attempted to be proved in two ways: (a) Personal notice given to appellant by appellee, his brother, and a friend, or agent. (b) That prior to the execution sale appellee notified Ballard, then attorney for appellant, of the mortgage assignment, and that such notice became constructive knowledge of appellant.

Appellant denied both. The evidence, if it does not preponderate in favor of appellant, leaves the giving of personal notice in doubt. Upon the question of constructive notice, the evidence, admissions in the brief and in oral

arguments before this court show that appellee and his witnesses testified they told Ballard of the assignment of the mortgage to Baker before the execution sale; Ballard, in fact, did not inform appellant, his then client, of any such notification, but on the contrary he referred appellant to a stranger when she inquired of him concerning the title to the lots, and, apparently, purposely refused to tell his client anything; that Ballard and Baker, his agents and friends, were all acquainted and on good terms before the sale and at all times since, and if appellant did not have personal notice from appellee and his agents, the only knowledge appellant did have of the note and mortgage was constructive, through Ballard. But for the mortgage Miss Reed would have had clear title to the lots.

Before the trial commenced in the district court appellant vigorously protested against Ballard acting against her and for her adversary in a matter so closely connected with the title to the lots and its procurement for her by Ballard as her attorney. No witness, other than Baker, his agents and friends, testified concerning notice to Ballard of the assignment of the mortgage to Baker. Ballard did not testify for either the plaintiff or defendant, but put himself in the front line of battle in making proof of a very material fact against his former client, which, if not true, he alone could deny; and which he was, by reason of his then employment by Baker, greatly interested in allowing to pass by as true. Of course appellant could not have been expected to call a witness whose unfaithfulness had been previously demonstrated. If he had knowledge of the assignment of the mortgage, his duty was to tell his client at the time that knowledge was obtained. If he did not have such knowledge, the only honorable thing for him to do was to deny it. In either case he sought to prove his own wrong, to be right, in order to perpetuate his wrong, to the injury of his former client in a matter pertinent to the results he was then seeking. If that were all, perhaps, but only perhaps, his last client should not be made to suffer. Appellee does not have the excuse that

the only notice he had of the perfidy of his attorney toward the matter in hand was constructive. He was present at the trial when the true relations between Ballard and his first client were disclosed, and then knew that he (appellee) was asking the aid of the attorney to do an inexcusably unprofessional thing.

Whether appellee took the view that a continuing retainer would effectually close the mouth of Ballard, as a witness for appellant, against a denial by him of his knowledge need only be suggested, without asserting it to be true.

In *Fitzsimmons v. State*, 116 Neb. 440, opinion by Dean, J., this court held that two lawyers intimately and closely associated, by a limited partnership, could not appear, one for the prosecution and the other for the defense, in a criminal case. For that reason alone a conviction of Fitzsimmons of the crime of shooting with intent to kill was set aside. This court will not review a case of this sort, as a court of chancery, further than to reverse a decree procured by such indicated methods. The trial court should have excluded Ballard from the case. Lawyers should not expect the approval of courts and society of conduct which so reflects on a great profession, as well as upon the courts, as to justify public distrust already too much abroad. The decree of the district court is reversed and remanded at the cost of the appellee in both courts.

REVERSED.

N. M. SOMMERVILLE, APPELLANT, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL., APPELLEES.

FILED OCTOBER 19, 1928. No. 25643.

1. **Taxation**: APPEAL. Original opinion reported in 116 Neb. 282, amplified by a construction of sections 865, 866, and 5975, Comp. St. 1922, governing appeals from actions of county boards of equalization, and approved as thus amplified.
2. **Pleading.** One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations.

3. **Taxation: EQUALIZATION: APPEAL.** "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power." *Reimers v. Merrick County*, 82 Neb. 639.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Affirmed.*

Brown & Dibble, for appellant.

W. W. Slabaugh, Henry J. Beal, James H. Adams and *Gaines, Van Orsdel & Gaines, contra.*

Edwin F. Myers, amicus curiæ.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

PER CURIAM.

This case will be found reported in 116 Neb. 282. After the opinion was adopted, a motion for a rehearing was filed by appellant, and the case was set for argument on the motion before the court, which was had. A careful review of the record, in the light of able arguments of counsel both oral and by way of printed briefs, impresses us that the original opinion correctly reflects the facts and applies the law thereto, and it is adhered to. However, as the questions involved are of a public nature, in order that the law as thus announced may be more readily understood, it might be helpful to call attention to certain statutory provisions explanatory of that part of the opinion wherein we stated: "Attention is called to the fact that plaintiff did not give notice of appeal within ten days as provided by section 866, Comp. St. 1922. This is a jurisdictional requirement, and a failure to comply with the statute defeats the appeal. Taxpayers' appeals are usually impressed with a public interest, and earlier notice of an intent to contest the decisions of the boards of equalization in these cases is required, presumably for the purpose

of affording the boards an opportunity to rectify their action. The right to appeal is a statutory one, and the record must conform to the statute where the requirements are mandatory."

Section 5975, Comp. St. 1922, provides in part, as follows: "Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Turning then to sections 865 and 866, Comp. St. 1922, which are applicable to cases involving the allowance or disallowance of claims against the county, we find the following requirements:

Section 865 provides among other things: "And when the claim of any person against the county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing, of the fact, within five days after such disallowance."

Section 866 provides: "Any taxpayer may likewise appeal from the allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section."

Thus it will be seen that two kinds of notices are provided for, to wit: Under section 865, a claimant (a party having a direct interest in the matter) must serve notice of appeal within twenty days after the board's decision; while under section 866, a taxpayer (a party having an

indirect interest in the matter) must serve notice of appeal within ten days after the board's decision. As we have seen, Sommerville, the appellant herein, is a taxpayer, having no direct interest in the matter before the board, yet clothed with an indirect interest as such taxpayer, and therefore he was required to serve notice of appeal within ten days from the decision sought to be appealed from, which he did not do. Thus considering section 865 and section 866, we are constrained to conclude that whether such notice shall be one served within twenty days, or one served within ten days, depends upon whether the challenge is made by one having a direct interest as the owner of a claim, or by one having an indirect interest as a taxpayer.

One whose authority to prosecute an action is limited by statute must plead facts which bring him within such statutory limitations. Then, as we said in the course of the opinion in *Reimers v. Merrick County*, 82 Neb. 639: "Whenever the legislature provides for an appeal to a court from a decision of a board of equalization, that court, no matter what may be its grade, is one of limited jurisdiction for said purpose, and must keep strictly within the letter of the statute defining its power."

In this case Sommerville pleaded that his interest in the matters involved was that of a taxpayer, yet he failed to allege that he had, within ten days, given the required notice of his intention to prosecute an appeal from the action of the board of equalization complained of, a necessary jurisdictional fact, and neither does the record disclose that such notice was given in the ten days. Hence, the trial court did not err in sustaining the demurrers to the petition.

In harmony with the original opinion, and the views herein expressed, the judgment of the trial court is

AFFIRMED.

W. B. MEYER ET AL., APPELLEES, V. CITY OF ALMA ET AL., APPELLANTS.

FILED OCTOBER 19, 1928. No. 26119.

1. **Constitutional Provision.** Section 21, art. I of the state Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."
2. **Eminent Domain.** Before the land of an owner can be taken or damaged for public use, the value of the property to be taken or of the damages to be done shall be ascertained and provision made for payment thereof.
3. **Equity.** Equity and good conscience will not permit a person to stand by and see acts done involving risk and expense by others, and then permit him to enforce his constitutional rights by means of injunction in a court of equity, when he has an adequate remedy at law.

APPEAL from the district court for Harlan county: WILLIAM A. DILWORTH, JUDGE. *Reversed, with directions.*

O. E. Shelburn and *J. F. Miller*, for appellants.

Clarence A. Davis and *Wilber S. Aten, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOSS, C. J.

The district court issued a mandatory injunction against the defendants to abate what it termed a nuisance in the form of a ditch on the public highway in front of the property of the plaintiffs. Defendants appealed.

The road in question is a part of the public highway and has existed for many years as a highway. It runs east and west on the section line between sections 28 and 29 on the north and sections 32 and 33 just north of the main part of Alma. A portion of the highway at least was referred to by one witness as Seventh street. For the most part it may be inferred from the evidence that the highway marks the northern boundary of the city. The city authorities were desirous to get the advantage of a paved highway to connect with the pavement of the

city. The highway was a part of what is commonly called the "Golden Rod Highway." The county authorities joined with the state and federal authorities to improve this road as a part of a state and federal aided highway known as project 71-E. Pursuant to plans and specifications prepared by the department of public works a contract was let to the Yant Construction Company of Omaha to grade and pave the road. The city of Alma, the county of Harlan and the department of public works of the state of Nebraska were parties to the contract. The city of Alma, it appears from the evidence, had a private agreement, not set forth in terms in the evidence, to pay to the county a portion of the cost of the project. Under the contract the original highway was regraded and the traveled way widened so as to accommodate a pavement 18 feet wide and an unpaved portion of the highway 10 feet immediately north of the pavement. Thirteen feet of this pavement was laid south of the section line and five feet of the pavement was laid north of that line. In order to furnish the dirt, a ditch or borrow pit was made just north of the improved highway or north of the north shoulder of the traveled part of the highway. This ditch thus created was 14 to 18 feet wide and in some places three or four feet deep. It is this ditch which caused the complaint of the plaintiffs. They complain that it is so deep that it carries water farther west than it was wont to go before the improvement was undertaken, that it will result in taking and damaging their land north of the limits of the highway and that it has rendered their lands and homes inaccessible by reason of the ditch created between the portion of the highway graded and paved for travel and the south fronts of the lands of the plaintiffs. There was some testimony that one of the bridges erected as a part of the project to connect the land of one of the plaintiffs with the grade was weakened so that threshing apparatus did not have safe access to his property. To this it might be answered that the injunction forbade the defendants to repair it.

There is evidence on behalf of the Yant Construction Company that it was through with the grading, paving and other work and had received its pay before this suit was brought. The damage, if any was done, occurred, or, if it is a continuing damage, it began, before action was taken by the plaintiffs. It is true that one of the witnesses for defendants said it was the purpose to smooth up the ditch by doing some back sloping before considering it a finished job. In a general way, it may be remarked that the plaintiffs stood by, saw the grading of the road, the excavation of the ditch to furnish dirt for such grading, and witnessed the laying of the pavement upon this important project in front of their lands and homes without a protest. They accepted and used bridges across the ditches to their respective homes.

It is true that section 21, art. I of the state Constitution, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." It is also well established in our decisions that, before the land of an owner can be taken or damaged for public use, the value of the property to be taken or of the damages to be done shall be ascertained and provision made for payment thereof. But where, as in this case, the plaintiffs, with full knowledge of what was being done, delayed and neglected to assert their constitutional rights until the defendants had placed themselves in a position where they were unable to extricate themselves without greater injury and damage than the plaintiffs would suffer, the hard and fast remedy by injunction ought not to be enforced in favor of the plaintiffs. Equity and good conscience will not permit a person to stand by and see acts done involving risk and expense by others and then permit him to enforce his constitutional rights by means of injunction in a court of equity when he has an adequate remedy at law. *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121; *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18; *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798; *City of Chad-*

ron v. Card, 107 Neb. 376; *New York City v. Pine*, 185 U. S. 93; 14 R. C. L. 362, sec. 63. The inconvenience to the public and the unnecessary expense to the city of Alma and the county of Harlan, if the injunction should be allowed to stand, outweigh the right of the plaintiffs to insist upon a choice of remedies. By their conduct they have waived such choice.

We are of the opinion that the trial court erred in entering a decree of injunction under the pleadings and proofs and that it should have dismissed the petition for injunction without prejudice to the rights of the plaintiffs to pursue their remedy at law for such damages, if any, as they have suffered by the alleged taking of their property or the damaging thereof by the construction of the road and ditch.

The judgment of the district court is reversed and the cause is remanded, with directions to enter a judgment in harmony with the opinion as above expressed.

REVERSED.

CONRAD KUXHAUS V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26494.

1. **Criminal Law**: EVIDENCE UNLAWFULLY OBTAINED: ADMISSIBILITY. Where articles pertinent to the issues are offered in evidence, they will not be excluded because they have been obtained in an irregular or illegal manner.
2. ———: WITNESSES: COMPETENCY. One who has had experience with mash for many years is competent to testify that a mixture of rye, water and other ingredients is in a state of fermentation and is mash.
3. ———: "MASH." "Considering the purpose and intention of the law, the word 'mash' in section 3252, Comp. St. 1922, is held to include any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was intended to be produced as a stage in the process of manufacturing intoxicating liquor." *Blevins v. State*, 109 Neb. 183.
4. **Intoxicating Liquors**: FINDINGS: SUFFICIENCY OF EVIDENCE. Evidence, outlined in the opinion, *held* sufficient to warrant a finding that defendant had in his possession mash and part of

the necessary equipment for the manufacture of intoxicating liquor and for the purpose of manufacturing such liquor.

5. ———: ———: ———. To constitute the offense of possession of mash and equipment for making intoxicating liquors, being used in the process of manufacturing intoxicating liquors, it is not necessary to a conviction that intoxicating liquors shall have been completely manufactured. The only requirement of the statute to complete the offense is that defendant have in his possession mash that is being used in the process of manufacturing intoxicating liquors. It is not essential that the process shall have been completed.

ERROR to the district court for Scotts Bluff county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Morrow & Morrow, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

Conrad Kuxhaus, hereinafter referred to as defendant, prosecutes error, to review his conviction of the offense of having in his possession mash, in a state of fermentation, being used in the manufacture of intoxicating liquors, and for possession of equipment for the manufacture of such liquors.

From the record it appears that, in the performance of his duty, the sheriff of the county visited the home of the defendant for the purpose of serving a notice upon him. On knocking, he was invited into the home. While there, he observed the odor of fermenting grain and observed near the stove a 20-gallon jar covered with a blanket. He made inquiry as to what was contained therein, removed the cover and discovered 10 to 15 gallons of rye, some orange peel, lemon peel, and other ingredients, in a state of fermentation. By consent of the person in the house, he obtained a pail or jar and took a sample of the mixture. Later he examined the out-buildings, and found a pressure

cooker in a coal house, some 25 feet distant from the kitchen. Attached to the pressure cooker, in the place of the steam whistle or poppet valve, was a hollow metal elbow, which was screwed into the top of the cooker; the other end of the elbow threaded, so that, by means of a coupling, a coil could be readily attached thereto. The defendant was not in his home at the time. So far as appears, the sheriff, without protest from those in the house, took the sample and the pressure cooker, and later arrested the defendant. The sample of the mixture, taken from the jar, and the pressure cooker, with the elbow attachment, were received in evidence over objection by defendant that they were not competent because obtained by an unlawful search and seizure, and in violation of state and federal constitutional provisions.

We doubt very seriously whether the circumstances under which the sheriff obtained possession of the exhibits in question are sufficient to show that they were obtained in an unlawful manner. It appears that the sheriff was in the home of the defendant on a lawful mission, and, while in the home, saw and observed the fermenting mixture. There was sufficient to indicate to the sheriff that the mixture was being prepared and used in the process of manufacturing intoxicating liquors. Under such circumstances, we think it was not an unlawful act for him to take possession of and preserve the mixture, to be used as evidence. Suppose that while on a lawful mission he had entered the defendant's house, without force and by invitation of those present in the house, and had found the defendant in the commission of any other crime, would it be contended that it was not the sheriff's duty to arrest the defendant? And if, at the time, the defendant was in possession of deadly weapons, or other articles, which he was using in the commission of the crime, could it be seriously questioned that it was the duty of the officer to take possession of such articles and preserve them for introduction in evidence? We scarcely think so. But, whether the exhibits in question were obtained

by unlawful means, is wholly immaterial under repeated decisions of this court.

The admissibility of evidence so procured has frequently arisen in this jurisdiction. In *Billings v. State,* 109 Neb. 596, the authorities were reviewed, and it was there held: "Where articles or information are offered in evidence, which are pertinent to the issue, the court will not exclude them because they have been obtained in an irregular or illegal manner." The rule there announced has been followed in *Bush v. State,* 112 Neb. 384, and *Walker v. State,* 113 Neb. 19. While it may be conceded that the rule is different in the federal courts and in a number of the state jurisdictions, we do not feel at liberty to depart from the rule so long established in this jurisdiction.

Defendant contends that the evidence is insufficient to support the verdict, even if the exhibits were properly received in evidence. It is argued that the sheriff was not competent to testify that the mixture of rye, water and other ingredients in the jar was mash. The record discloses that the sheriff was, and for a number of years had been, familiar with mash. It was sufficient to qualify him to testify. In any event, the defendant, when on the stand as a witness in his own behalf, testified that the jar contained rye, water and other ingredients; that the rye had been soaking for three weeks or longer, was sour and smelled. From this, any intelligent person would properly infer that fermentation had begun.

In *Blevins v. State,* 109 Neb. 183, it was held: "Considering the purpose and intention of the law, the word 'mash' in section 3252, Comp. St. 1922, is held to include any mixture of grain or malt with water or other liquid in such a manner as to evidence that fermentation was intended to be produced as a stage in the process of manufacturing intoxicating liquor." In *Sommers v. State,* 112 Neb. 311, it was held: "The word 'mash,' as used in the prohibitory statute, includes any mixtures of grain, either whole, cracked or crushed, or malt, mixed with water or other liquid so as to produce fermentation." Under the

rule thus established in this court, the evidence of defendant alone was sufficient to show that the mixture in the jar was "mash," within the meaning of the prohibitory statute.

It is further urged by the defendant that, even if the mixture was mash, the evidence was insufficient to show that it was in defendant's possession for the purpose of manufacturing intoxicating liquor. From the record it appears, by defendant's own testimony, that the mixture had been kept in the house, near the stove, for a period of three weeks or longer; that he claimed it was intended for hog feed and that he had been feeding his hogs therefrom daily for a period of three weeks or more; yet the evidence shows that the jar was two-thirds, possibly three-fourths, full at the time of the sheriff's visit. It is quite evident that if intended for hog feed and defendant had been feeding his hogs from it for three weeks, he must have been using it in very small quantities. Moreover, the sheriff testified that there was either sugar or molasses in the mixture, and, when defendant was interrogated on the witness-stand as to whether there was any sugar therein, he gave an evasive answer, saying that he could not afford to buy sugar for the hogs, but he did not deny that there was sugar or molasses in the mixture.

It is further contended that the pressure cooker was not a still or a part of a still. The pressure cooker was, in fact, an aluminum vessel, with clamps with which to screw down the lid, so as to be air-tight. The vessel had a capacity of eight or ten quarts. In the lid were three openings, into one of which was fitted a pressure gauge, which would show the amount of steam pressure. In the second hole was a pet cock, evidently for the purpose of letting out the steam before removing the lid. The third was ordinarily fitted with a poppet valve so that when the steam pressure became too strong the poppet valve would open and allow part of the steam to escape. The poppet valve had been removed and in its place was an elbow, threaded at each of its openings, one of which would

screw into the opening in the lid of the cooker, and the other threaded so that, by means of a coupling, a coil could be readily attached thereto. No other part of the cooker was produced, nor was there any indication that the elbow was used for any part of the implement as a pressure cooker. The explanation given by defendant was that, when using the cooker for preserving fruits, they placed the elbow in the opening so as to allow the steam to escape; but removing the poppet valve would allow the steam to escape as readily. In any event, it would not appear necessary, if an elbow were used, that both ends should be threaded. Another significant thing, which no doubt attracted the jury's attention, is that, while the elbow, poppet valve and the pet cock were all of brass, there was a distinct difference in the finish of the elbow and that of the poppet valve and pet cock, which were regular parts of the pressure cooker. This would lead to the inference that the elbow was not a part of the original equipment of the cooker. Another significant thing was the location of the cooker. Ordinarily, it would be kept in the kitchen; it was found in the coal shed, 25 feet distant therefrom, and covered over with some sort of a cover. Defendant said it was to keep the coal dust out, but no doubt the jury drew the conclusion that it was kept in the coal house and separated from the mash so that suspicion would be diverted. Under the circumstances indicated, we are of the opinion that the evidence was sufficient to warrant the jury in finding that the defendant had in his possession mash and a part of the necessary equipment for manufacturing intoxicating liquor.

Defendant urges that, unless the evidence warrants the finding that the mash was being used in the process of manufacturing intoxicating liquor, it will not support a conviction under section 3252, Comp. St. 1922, on which the prosecution was founded. That part of the section, applicable to the case before us, is as follows: "Any person who shall manufacture intoxicating liquor in violation of this chapter or who shall have possession of any still or

any part thereof or of any other equipment for making intoxicating liquor or who shall have in his possession any mash or other material being used in the process of manufacturing intoxicating liquor, * * * shall, upon conviction," etc.

As we have indicated, the evidence was sufficient to justify the jury in finding that the mash was in the possession of defendant for the purpose of manufacturing intoxicating liquor. In fact, the fermentation was one part of the process of the manufacture.

Counsel for defendant argue that it is necessary to a conviction under the present statute that intoxicating liquor shall have been completely manufactured. The only requirement of the statute to complete the offense is that defendant have in his possession mash that is being used in the *process of manufacturing* intoxicating liquor. It is not essential that the process shall have been completed.

Defendant complains of the failure of the court to give certain requested instructions. We have examined the charge given by the court and find that every essential element of the offense was covered by the instructions given by the court on its own motion, and that no error was committed in refusing to give those requested.

The record is free from prejudicial error. The judgment is therefore

AFFIRMED.

WILLIAM NOONAN V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26328.

1. **Rape**: IDENTIFICATION OF ACCUSED: CORROBORATION. The Nebraska rule requiring certain corroboration of the prosecutrix in prosecutions for rape and assault with intent to commit rape does not extend to, or include, the question of the identity of the accused, and in such cases the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established.
2. **Evidence** examined and *held* ample to sustain the verdict of the jury.

3. Jury: SELECTION: QUALIFICATION OF SHERIFF. A sheriff who is not the prosecuting witness nor the sole witness in a criminal case, but whose evidence is affirmatively shown by the record to be corroborative merely, is not, by the fact that he is called as a witness and his name, as such, is indorsed upon the information charging the offense being tried, disqualified thereby from performing the duties of his office; nor do these facts render a panel of jurors selected and summoned by him, under direction of the district court as provided by section 9078, Comp. St. 1922, vulnerable to challenge.

4. ———: ———. Action of trial court in disposing of certain challenges to jurors on their *voir dire* examination examined and approved.

ERROR to the district court for Cuming county: ANSON A. WELCH, JUDGE. *Affirmed.*

O'Sullivan & Southard and *Hunker & Gross*, for plaintiff in error.

O. S. Spillman, Attorney General, Harry Silverman and *Robert R. Moodie, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

EBERLY, J.

William Noonan, hereafter called the defendant, was convicted in the district court for Cuming county, Nebraska, of a felonious assault upon Gladys Ford with intent to commit rape, made on September 19, 1927. He was sentenced to be imprisoned in the penitentiary of this state at hard labor for five years. To reverse this conviction and sentence he appeals to this court.

Numerous assignments of error are made in the briefs, which may be summarized as relating to (1) the sufficiency of the evidence to sustain the conviction; (2) refusal of the district court to quash the second jury panel selected and summoned under the provisions of section 9078, Comp. St. 1922, on the ground that the sheriff who selected and summoned the same was disqualified on account of inter-

est; (3) error of the court in overruling certain challenges to the competency of certain jurors; (4) error of the court in restricting cross-examination, especially with reference to certain photographs presented by the defense as part of the cross-examination of the prosecutrix.

The first question for consideration is the claimed insufficiency of the evidence connecting the defendant with the crime. It is contended that the evidence lacks the necessary corroboration of the prosecutrix required in prosecutions of rape and kindred offenses, and it is challenged because of its inherent weakness.

There can be no question that the *corpus delicti,* the actual commission by some one of the particular crime charged, is established in this case by ample evidence. Indeed, this is not questioned by defendant. His counsel, in their briefs, state: "It is admitted that an assault with intent to commit rape was made upon Gladys Ford on September 19, 1927, at about 4:45 p. m. at the place charged. The only dispute in the case is as to the identity of her assailant." Argument in behalf of the defendant then proceeds on the basis that the positive identification by the prosecutrix of the defendant as the assailant on the witness-stand at the trial must, as a matter of law, be corroborated by evidence other than her own before his own positive testimony in his own behalf to the contrary is overcome; in other words, that the prosecutrix in cases of assault with intent to commit rape must be corroborated in the same manner and to the same degree as to the identity of the accused as is required to establish the *corpus delicti.*

The district judge, at the trial of the case, gave the usual instructions as to the necessity of the corroboration of the prosecutrix. The following excerpt from instruction No. 9 given by the district court indicates their general tenor: "It is not essential that she be corroborated by direct evidence of the particular fact or facts constituting the crime. * * * She must, however, be corroborated as to material facts and circumstances which tend to sup-

port her testimony and from which, together with her testimony as to the particular act constituting the crime, the inference of guilt may be drawn."

It is to be remembered that Nebraska has no statute providing that a defendant cannot be convicted of rape or of an assault with intent to commit rape unless the prosecutrix be corroborated by evidence other than her own tending to connect the defendant with the commission of the offense. The present rule on that subject is the result of judicial decision and not of legislative enactment.

In *Garrison v. People*, 6 Neb. 274, we held that it was not error for the court to refuse to instruct the jury that they could not convict the defendant upon the unsupported testimony of the prosecutrix.

In *Mathews v. State*, 19 Neb. 330, the attention of the profession was drawn to the fact that in *Garrison v. People, supra*, a bill of exceptions of the evidence had not been preserved, and that it was not intended in that case to hold that a conviction of rape would be sustained upon the testimony of the prosecutrix, if her sworn statements were disputed by other testimony, and "there were no marks upon her person or clothing showing a recent struggle, or no complaint as soon after the occurrence as an opportunity offered." The rule thus announced has been the basis of our procedure in prosecutions of rape and kindred offenses since the date of the opinion last referred to, and has been consistently adhered to in a line of well-considered cases. It must be admitted, however, that this rule is not in accord with the rule at common law, that in most jurisdictions it is not necessary, as a matter of law, to corroborate the testimony of the prosecutrix. In other words, the general rule, in the absence of statute, appears to be that the uncorroborated testimony of the prosecutrix is sufficient to carry the case to the jury, and it has been held that the rule is the same in cases of assault with intent to commit rape. It should be said, however, that this rule of corroboration,

even as thus restricted, does not bear the unanimous approval of the members of this court as now constituted. See dissenting opinion by Rose, J., in *Swogger v. State*, 116 Neb. 563, 569.

We are now asked, in effect, to extend the principle announced first in *Mathews v. State, supra*, to the extent of requiring corroboration, as a matter of law, of the prosecutrix' evidence as to the identity of her assailant. Three cases are cited to sustain the contention of the defendant, *Dunn v. State*, 58 Neb. 807; *Mott v. State*, 83 Neb. 226; *Boling v. State*, 91 Neb. 599. But in none of these cases was the exact question presented upon which the present case must be determined. The gists of these decisions are simply a restatement of the general rule first announced in *Mathews v. State, supra*, and the expressions used by the court in the various opinions are not applied to the specific question of proof of identity of the accused.

The precise question, however, before us was discussed by this court in *Henderson v. State*, 85 Neb. 444, and in which *Mott v. State, supra*, cited by defendant, is distinguished. It was there insisted by the defendant charged with rape that, as a matter of law, he could not be convicted "unless the prosecutrix be corroborated by other evidence tending to connect the defendant with the commission of the offense." Iowa cases were cited in support of this proposition. Root, J., in delivering the opinion of the court, disposed of this contention in the following language:

"Counsel for defendant cite Iowa decisions, but they have reference to a statute which provides that a defendant cannot be convicted of rape unless the prosecutrix 'be corroborated by other evidence tending to connect the defendant with the commission of the offense.' In the application of that statute, the courts of our sister state hold that the prosecutrix cannot by her own testimony furnish that corroboration. Proving that the prosecutrix has been ravished and establishing that a defendant is the guilty man are very different propositions, and evidence

tending to corroborate one fact does not necessarily nor logically confirm the other. We recognize the distinction and, in the absence of a statute on the subject, hold that the unsupported testimony of the prosecutrix may be sufficient to identify the guilty party if the commission of the offense has first been established. *Younger v. State,* 80 Neb. 201."

In *Younger v. State,* 80 Neb. 201, Letton, J., in delivering the opinion of the court, in substance indicates that evidence corroborating the testimony of the prosecutrix as to the identity of the accused charged with rape by force and violence, and where the assault was evident, as a matter of law, is wholly unnecessary. At least, no greater evidence should be required than in a "violent assault of another nature." The reasoning upon which the two decisions last referred to are based is convincing.

A woman becomes a victim of an assault made with intent to commit murder, to rob, or to commit great bodily harm. In these cases the law accords to her evidence the same weight, the same force and effect, in the prosecution of the offense as it accords the men, under like circumstances and conditions. It does not require in such cases corroboration which the Nebraska rule exacts in cases where rape is involved.

The theory of the Nebraska rule is, that the nature of rape is such that evidence to establish the same may be easily fabricated and hard to disprove, and, therefore, a technical corroboration, as a matter of law, is required. Where, however, the offense charged has been fully, completely and admittedly established beyond a reasonable doubt, the dangers which the Nebraska rule seeks to avoid are past, no occasion for fabrication then arises, and no reason, therefore, exists for the extension of the principle involved.

It follows, therefore, that, where the *corpus delicti* involved in a charge of assault with intent to commit rape, robbery, murder, or with intent to do great bodily harm has been fully established, the weight of evidence neces-

sary to connect the accused with the offense should be identical; that, under these conditions, a woman's evidence is entitled to receive the same consideration from our tribunals as that to which the evidence of a man under like circumstances is entitled. It follows that the contention as to the necessity of corroboration of the prosecutrix' evidence in this case, connecting the defendant with the offense, is disapproved.

We have carefully read the evidence in the record, as set forth in the briefs of the parties, relating to the connection of the accused with the offense charged. The unqualified identification of the accused by the prosecutrix, in the light of the surrounding circumstances and the other facts detailed in the evidence, is such that there is ample proof to sustain the verdict of the jury on this question.

Complaint is made as to the action of the district court in overruling defendant's motion to quash the special panel of the jurors from which the jury which tried the defendant was drawn. It is charged that the sheriff who, under the direction of the court, selected and summoned this special panel was disqualified on the grounds of interest, he being a material witness for the state in the case. It may be said in passing that the record discloses that, though the sheriff testified in behalf of the state at the preliminary hearing, he was not called in the district court as a witness by the state in making its case in chief, and though called by the state on rebuttal was not permitted to testify. He was not the prosecuting witness and, so far as the record discloses, his evidence was wholly corroborative in its nature, and pertained solely to facts which it was his official duty to ascertain, to "ferret out," and to know.

Eliminating all consideration of questions arising from the manner of presentation, and on the basis that the questions sought to be raised were properly presented, should the defendant's contention be sustained?

Section 4989, Comp. St. 1922, among other provisions,

prescribes in part: "It shall be the duty of the sheriff * * * to ferret out crime, to apprehend and arrest all criminals, and in so far as it is within his power, to secure evidence of all crimes committed in his county, * * * and to perform all other duties pertaining to the office of sheriff or enjoined upon him by law."

Section 9078, Comp. St. 1922, under the facts in the instant case, concededly applicable to the selection of jurors, expressly authorizes the district court: "Whenever at any general or special term * * * for any cause there is no panel of * * * petit jurors, or the panel is not complete, said court may order the sheriff * * * to summon without delay good and lawful men, having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the * * * petit jury * * * unless such person may be excused from serving or lawfully challenged."

The provisions of section 4989, *supra*, above quoted, were enacted in 1917. The portions of section 9078, above quoted, were at that time upon the statute books of the state. The legislators must, therefore, be presumed to have been familiar with the provisions last referred to, and the enactments must be construed together.

It may therefore fairly be said that the authors of this legislation apparently deemed that the proper and complete performance of the duties enjoined by section 4989, *supra*, was not in any manner incompatible with the proper and full performance of the duties required by the provisions of the section 9078 quoted. Indeed, the conclusion that such must be deemed the legislative intent is strengthened by the fact that in the act last adopted, in point of time, it was expressly enjoined that it should be the duty of the sheriff, in addition to other duties expressly enumerated in section 4989, *supra*, to perform "all other duties pertaining to the office of sheriff or enjoined upon him by law."

We do not overlook the incidents set forth in the affidavits in behalf of defendant, forming part of the bill of exceptions, and which are in the nature of an attack on the

sheriff. But as to these, in view of the counter affidavits, there appears a fair conflict of the evidence which presented the matters of fact for the determination of the trial court. The trial court considered this evidence and determined the issues involved, and we do not find that error was committed. It is not thought that the mere fact that the sheriff, in the proper performance of the duties of his office, enjoined by statute, in ferreting out crime, in endeavoring to apprehend and arrest all criminals, and in endeavoring to secure evidence of all crimes committed in his county, becomes possessed of information that renders him a material witness, is thereby necessarily disqualified from further performance of the duties of his office. Such official conduct does not necessarily impeach his impartiality, as applied to his performance of official duty in selecting "good and lawful men, having the qualifications of jurors." Besides, in the instant case, the sheriff does not appear in the light of the principal, or the sole, or the prosecuting witness.

In *Policky v. State,* 113 Neb. 858, cited by defendant, the sheriff was not only the prosecuting witness but the principal and only witness against the defendant as to the essentials of the crime charged. Two trials had to juries drawn from regular panels had occurred. The third trial to a jury, selected by the sheriff under the provisions of section 9078, *supra,* resulted in a conviction from which that appeal was prosecuted. Each of the first two trials was followed by a disagreement. In view of the developments in the case, as disclosed by that record, it supported a fair inference that the prosecution had become, in fact, a contest between the sheriff involved and the accused. The case was thus of an exceptional character and contained features wholly absent from the present record.

In *Nelson v. State,* 115 Neb. 26, cited by defendant, the record disclosed, by offers of proof and otherwise, that a charge had been made on behalf of the defendant in his attack upon the jury panel that the officers selecting the

same were members of a society then actually engaged in actively prosecuting the defendant, and had individually contributed money to hire detectives for the purpose of convicting the defendant. As to the charge thus made, the record indicated that the trial court had apparently denied the defendant an opportunity to prove and establish the same. Thus it will be seen that the instant case is not within either the reason of the rule on which the cases cited were based, nor, indeed, within the letter of these opinions, as expressed by this court.

We have carefully considered the assignments of error based upon the rulings of the district court during the *voir dire* examination of the jurors who were impaneled and tried this case. We do not find that any substantial error was committed. This is particularly true as to Clarence Fesler whose evidence is copied in full by the defendant in his brief. It would unduly extend this opinion to set forth the evidence upon which the defendant bases his objections to the competency of this juryman. It must be said, however, that it fairly appears that Fesler knew the prosecutrix and her mother; that the prosecutrix was a close friend of his daughter; that he knew the sheriff, and he had known the county attorney for 15 years; that he had never talked about this case with witnesses or persons who knew the facts; that he had formed no opinion as to the merits of the case; that there was nothing said by any parties interested to him that would make him either for or against the defendant; that he had no feeling of bias or prejudice in the matter. Indeed, his attitude may be set forth and may fairly appear from the following question and answer thereto: "If you were selected as a juror, you think you could carry out the instructions of the court if the court told you, among other things, that the burden was on the state and that there was a presumption of innocence in favor of the man on trial, and that presumption continued as evidence in his favor until he was proved guilty by evidence beyond a reasonable doubt? You would accord to William Noonan

the benefit of every rule of law and presumption of law the judge told you he was entitled to? A. I would."

Giving due consideration to this evidence as an entirety, and having due regard to the personal presence and observation of the trial judge, we cannot say that, in overruling defendant's challenge to this juror for cause, any error was committed by the trial court.

During the course of the trial the defendant, as part of the cross-examination of the prosecutrix, sought to require her to identify photographs of the defendant submitted to her in company with, and as part of, a collection of photographs of young men all of similar build, all dressed in like garments, and of disguise in a like manner. The trial court excluded the proposed cross-examination, and the defendant alleges error, but cites no authorities sustaining his contention. Also, we are unable to find any that are in point. In principle, the rule applied by the trial court was proper. There is no evidence in the record that the identification of the accused by the prosecutrix was in any manner aided by or based upon any photograph. Her evidence in chief in no manner refers to any photograph of the defendant. The identification of the accused by her was based upon a close (save a masking handkerchief) and wholly unobstructed view of the accused in broad daylight, and it necessarily not only involved general build, general appearance of form and features, but also peculiarities of shifting eyes, color of eyes, color and texture of hair, and identity of voice. Many of these elements were necessarily eliminated in the proposed testimony of photograph inspection. The requirement proposed, therefore, was manifestly unfair, and undoubtedly was not proper cross-examination.

It follows that no substantial error appears in the record before us, and the conviction and sentence of the district court is, in all things,

AFFIRMED.

FERL FLANAGAN ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1928. No. 26385.

1. **Larceny**: INSTRUCTIONS. Instruction given by the district court on evidential effect of proof of unexplained possession of property, alleged to have been stolen, shortly after the theft thereof, examined and approved.
2. **Criminal Law**: WITNESSES: PRECAUTIONARY INSTRUCTION. The rule announced in *Preuit v. People*, 5 Neb. 377, that, "where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested," will not ordinarily apply to a county attorney, a sheriff or his deputy, or to private persons not detectives or employed as such, but whose acts are prompted solely by consideration of public good, and who are uninfluenced therein by any pecuniary or financial interest in the result of the prosecution then pending or contemplated. *Keezer v. State*, 90 Neb. 238; *McMartin v. State*, 95 Neb. 292, reaffirmed.
3. **Evidence** examined and *held* ample to sustain the conviction of both defendants.

ERROR to the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Edward J. Lambe and *Bartos, Bartos & Placek*, for plaintiffs in error.

O. S. Spllman, Attorney General, and *Harry Silverman, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

EBERLY, J.

The defendants, Ferl Flanagan and James Burruss, were jointly charged with cattle stealing in the district court for Furnas county, Nebraska. To this charge both entered pleas of "not guilty." A trial of the issues by a jury resulted in a verdict of "guilty as charged." Both defendants were then sentenced to be confined in the state

penitentiary for a term of four years. From this conviction and sentence, each now presents a separate appeal.

The first error assigned in their behalf is that the district court erred in the giving of instruction No. 10 of the instructions given by that court on its own motion. This instruction covers the subject of the evidential effect of proof of unexplained possession of property, alleged to have been stolen, shortly after the theft thereof. It is conceded that the instruction in itself is a correct statement of the abstract principles involved, but it is claimed that it becomes erroneous because inapplicable to the evidence of the record.

It is to be remembered that the issues herein tried and determined were pleas of "not guilty" to an information charging a joint offense. Recent unexplained possession of stolen property described in the information was not only established as against Burruss by the witnesses for the state, but Burruss admits the theft of that property by himself, and admits that, on the night of the crime, he conveyed it out of the state of Nebraska. Though Burruss admitted the commission of the crime, his plea of "not guilty" remained unchanged, and it was essential that the jury convict him, if at all, upon due consideration of all the evidence of the record. As to Burruss, at least, it must be conceded there was ample evidence before the court to justify the giving of the instruction complained of. The instruction complained of was limited, by its terms, as applicable only to such defendant whose unexplained possession of the stolen property was established "by evidence beyond a reasonable doubt." Therefore Flanagan could not have been prejudiced thereby.

The defendants next contend that the district court erred in refusing to give instruction No. 11 requested by the defendants to the effect that—"A person who, at the instance of the authorities interests himself in securing evidence on behalf of the prosecution, or who is sent by the prosecuting authorities to ingratiate himself into the confidence of the accused persons and to secure from them

admissions or confessions of guilt, is to be considered in all respects the same as a detective, and in weighing the testimony of such persons, greater care should be exercised than in the case of entirely disinterested and impartial witnesses because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and to disregard everything which does not tend to support a preconceived opinion of the matter in which such person is engaged." The record discloses that the witnesses to whose testimony it was sought to apply the instruction requested included the sheriff of Furnas county, a deputy sheriff, the sheriff and county attorney of Wichita county, Kansas, as well as the son and brother of the complaining witness and certain farmers residing in the vicinity where the crime was committed. It was conceded in the argument that none of these parties could be properly classed as "detectives," although the fact that the crime committed had enlisted their active interest must be admitted.

In lieu of the instruction requested, the court, on its own motion, instructed the jury that—"In determining the credibility and weight to be given to the testimony of witnesses, you may take into consideration their interest, if any, in the result of this case, their conduct and demeanor while testifying, their opportunities for seeing and knowing the things about which they testify, and the reasonableness or unreasonableness of their story." Instruction No. 14.

The defendants cite as sustaining their contention *Preuit v. People*, 5 Neb. 377; *Kastner v. State*, 58 Neb. 767; *Sandage v. State*, 61 Neb. 240; *Fruide v. State*, 66 Neb. 244.

It would seem, however, that the witnesses in the present case, to whom it is sought to apply the rule set forth in defendants' instruction No. 11, are neither within the spirit nor letter of this rule, in view of the attitude of this court thereon, as evidenced by its later pronouncements.

In *Keezer v. State*, 90 Neb. 238, involving a situation

similar to what we have in the instant case, Root, J., said: "Counsel for the accused finally complain that the court did not give his requested instruction that the jury should scrutinize with greater care the testimony of witnesses engaged in hunting up evidence than the testimony of the other witnesses. The witnesses to whom this instruction was intended to apply are the county attorney, the sheriff and the deputy sheriff of Cass county. In *Preuit v. People*, 5 Neb. 377, the rule was announced that, 'where informers, detectives, or other persons employed to hunt up testimony against the accused, are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested.' This decision was followed in *Heldt v. State*, 20 Neb. 492, and in *Sandage v. State*, 61 Neb. 240. This is an exception to the general rule that the credibility of witnesses is solely for the jury to determine, and that the court should not attempt to influence the jury by discrediting the testimony of any witness, and does not find universal support in the decisions of other courts, nor in the books written upon this subject. Rapalje, Law of Witnesses, sec. 189; Underhill, Criminal Evidence (2d ed.) sec. 280*a*, and authorities there cited. The county attorney, the sheriff and the deputy sheriff are not spies, informers or detectives dependent upon a conviction for a pecuniary reward, and in the circumstances of this case we shall not extend the rule to include them within its ban." The position thus stated was reaffirmed in *McMartin v. State*, 95 Neb. 292.

It is the duty of good citizenship to uphold the law and aid in its enforcement. To do this the detection and punishment of crimes is a necessary incident. A well-considered public policy would indicate that, in the absence of affirmative evidence of the presence of a pecuniary or financial interest on part of a citizen in, or affected by, the results of a contemplated or pending prosecution, his commendable response to the demands of a public duty in the in-

vestigation of a criminal transaction should not necessarily result in discrediting his evidence in a court of justice. In the cases last cited, it is plainly indicated that it is the announced policy of this court to not extend the scope of the rule under consideration.

We therefore conclude that, in view of the fact that the rule announced in the instruction tendered by defendants and sought to be applied to sheriffs, county attorney, and certain citizens, none of whom were properly within the designation "detective," and as to none of whom does the record disclose any pecuniary or financial interest to be affected by the results of the prosecution, the action of the district court in refusing the same, in view of the instruction given by the court on its own motion, is approved.

It is contended that the evidence is insufficient to sustain the conviction of Flanagan. The theory of the state presented at the trial was that the larceny of the cattle was committed by Burruss and Flanagan. Burruss, though entering a plea of "not guilty," was sworn as a witness, admitted his guilt, and claimed that he acted alone. Flanagan also testified in his own behalf and denied that he had anything to do with the larceny.

It would unduly extend this opinion to set forth in detail the evidence contained in the record, but a careful examination of the evidence of a circumstantial nature produced by the state, and comparing it with the opposing evidence of the interested parties in the litigation, convinces us that the verdict of the jury on this conflicting evidence is amply supported and should not be disturbed on appeal.

We cannot say, as a matter of law, that the circumstantial evidence against Flanagan on the question in issue is so lacking in probative force that the jury should not be permitted to declare that they were convinced beyond a reasonable doubt of the truth of the charge against him. We regard this as true, even though it be considered a case in which reasonable minds, even if trained in law and the determination of questions of fact, might differ upon the

question of reasonable doubt involved. The close association of the two defendants immediately prior to the transaction involved, their relationship, their appearance at the scene of the crime on the day preceding the night the property was stolen, the improbability of the story of Burruss as he related it upon the witness-stand, when viewed in the light of the surrounding circumstances and admitted facts, and especially in the light of his apparent motive in taking the witness-stand as a witness, were such that the jury who heard all witnesses, saw the defendants and observed their demeanor on the witness-stand, were fully justified in determining the issues of fact involved in the manner which their verdict establishes. It follows that the contentions of the defendants on this point cannot be sustained.

The judgment of the district court is

AFFIRMED.

HELEN JOHNSON, APPELLANT, V. EVA KERN ET AL., APPELLEES.

FILED NOVEMBER 7, 1928. No. 26243.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Craft, Edgerton & Fraizer, Beeler, Crosbey & Baskins and *J. P. Voorhees*, for appellant.

H. M. Sullivan, T. F. Hamer and *Halligan, Beatty & Halligan, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

PER CURIAM.

Affirmed on authority of *Peterson v. Bauer*, 83 Neb. 405, and *Wiseman v. Guernsey*, 107 Neb. 647.

It appears from the evidence, as an entirety, that neither the articles of adoption nor the contract upon which

plaintiff relies as the foundation of her cause of action was established by proof clear, convincing and satisfactory.

AFFIRMED.

The following opinion on motion for rehearing was filed April 19, 1929. *Judgment affirmed.*

Evidence *held* to support denial of plaintiff's petition.

Heard before GOSS, C. J., GOOD, THOMPSON, EBERLY and DAY, JJ., and HASTINGS and REDICK, District Judges.

EBERLY, J.

Action in equity for a specific performance of an alleged verbal contract by Marinda Hovey, also known as Minnie Kern, that she "would adopt plaintiff as her own child," giving to plaintiff all the rights of inheritance by law, and that plaintiff as the adopted child of Marinda Hovey "should inherit the property of said Marinda Hovey, the same as if she were the daughter of the blood of said Marinda Hovey," and that certain real estate described be decreed to be held in trust for plaintiff on account of such agreement. Defendants joined issue. Trial to the court resulted in a general finding and certain special findings against plaintiff, including a finding that there was no "agreement or obligation on the part of the said Marinda Hovey to, in any manner whatsoever, convey or leave to the plaintiff any portion of the property of which said Marinda Hovey died seised," and that no agreement of any kind, either verbal or written, was established to have ever been made between said Marinda Hovey and any other persons, by which the said Marinda Hovey obligated herself to convey to plaintiff any portion of her estate. From this judgment plaintiff appeals.

At a former hearing by this court a judgment of affirmance was entered. *Johnson v. Kern, ante,* p. 536.

Argument was allowed on a motion for rehearing and we have been favored by additional brief and additional oral argument.

The direct evidence of plaintiff's mother in the record

is to the effect that, on a date not fixed, Marinda Hovey, then ordinarily known as Minnie Kern, in a house of prostitution in Sioux City, Iowa, wherein the mother, Maude McCauley, was then an inmate, and in which the plaintiff, then a little child, was kept, and of which Marinda Hovey was then the proprietress, orally agreed with the plaintiff's mother that plaintiff, then a child of three or more years, should be adopted by her, Marinda Hovey, given a good education, and should be made Marinda Hovey's sole heir; that the next morning in this house of prostitution in the presence of Mrs. Thurston, then the police matron of Sioux City, Iowa, this conversation was repeated in substance, and the plaintiff's mother and Marinda Hovey mutually executed "adoption papers" which Mrs. Thurston had prepared and brought with her; that the mother of plaintiff signed these documents, according to her testimony, without reading the same, but evidently assuming that they were made in accordance with the oral understanding.

These adoption papers, if actually made, were never recorded and there is no evidence in the record which discloses in any manner the terms which these papers actually contained.

The evidence of the mother is also in effect positive and without qualification that all negotiations and conversations between the plaintiff's mother and Marinda Hovey on the subject of the adoption, including the execution of the final and only papers of adoption, took place at one or more of the following places, viz., at the depot in Sioux City, Iowa, and in a "taxi" *en route* to 301 Pearl street on the night of plaintiff's first arrival at Sioux City, or at 301 Pearl street, the house of prostitution, during a few days immediately following plaintiff's first arrival. The testimony of this witness emphasizes the statement of her reluctance to give up her child and of the sudden evident infatuation of Marinda Hovey for plaintiff and her insistence that plaintiff's mother relinquish her offspring to this proprietress of the house of illfame.

Thus, we have a right claim based on negotiations as-

serted to have been had at a certain though, as to exact date, an indefinite time, and at a certain place, with definite parties present, inspired by particular motives, and for the accomplishment of a definite purpose.

The record contains other evidence offered in behalf of plaintiff, some of which corroborates in part the testimony of the mother of the plaintiff and much of which conflicts at least in material portions with this evidence, in the important particulars of place, motives, purpose and substance.

The evidence in behalf of the defendants, both direct and circumstantial, if believed, fairly tends to refute and is certainly wholly inconsistent with the claims of the plaintiff and with the statements of her witnesses.

In addition to this conflicting evidence there were probate proceedings had in the estate of Marinda Hovey, after the latter's death in the spring of 1904, and also proceedings had in the district court for Woodbury county, at Sioux City, Iowa, relative to the appointment of a guardian for plaintiff immediately following Marinda Hovey's death. Marinda Hovey, at the time of her decease, owned and possessed real and personal estate situated in Woodbury county, Iowa, which plaintiff now claims was then of the value of $50,000 or $60,000. Her husband, Edward C. Hovey, was, upon his own petition, duly appointed administrator of this estate by the district court for Woodbury county, Iowa, and administration was had therein as provided for by the laws of Iowa. In due time the proceedings were completed and Edward C. Hovey, as administrator, filed his final report, which was subscribed by him and sworn to before Joseph W. Hallam, notary public, and which was duly approved by the district court for Woodbury county, Iowa, on April 22, 1905. This final report contains these allegations, among others:

"That the only heirs at law of said Marinda Hovey, deceased, are this administrator (Edward C. Hovey), who was her husband, and Wm. Kern and Marinda Kern, his

wife, who are the father and mother of the said Marinda Hovey, deceased, there being no other heirs.

"That the above named heirs have all agreed among themselves as to the disposition of the proceeds of said estate and the taxes upon the real property have been paid.

"That the personal property has been disposed of and either converted into money or divided among the heirs as agreed to by them, and most of the real estate has been sold under such agreement, and that which has not been sold will be held by said heirs in common, as provided by law."

It appears from the public records of the recorder's office of Woodbury county, Iowa, that the real estate thus inherited by Edward C. Hovey and William Kern and his wife was in 1904 and 1905 conveyed and transferred by warranty deeds. Some of these conveyances were made to third parties, William Kern and wife and Edward C. Hovey, as widower, joining as grantors. At least one of these warranty deeds was a conveyance of an undivided one-half interest in certain real estate described therein made by William Kern and wife to Edward C. Hovey. This deed was executed and acknowledged in the presence of Joseph W. Hallam, as notary public. In the guardianship proceedings the petition signed and sworn to by William Kern before the same Joseph W. Hallam, notary public, on the 20th day of April, 1904, sets forth that "Agnes McCauley" has been abandoned by her parents who are nonresidents of Iowa, and is now in the care and custody of plaintiff, and that "your petitioner states that said minor has no property." The bond given was in the sum of $200 and executed by William Kern and Edward C. Hovey. Under the date of April 22, 1905, there appears a report signed and sworn to by William Kern before Joseph W. Hallam, notary public, which was filed in said proceedings, and avers that "said Agnes McCauley has no property of any kind whatever." Edward C. Hovey was killed in a railway accident May, 1913. Joseph W.

Hallam or J. W. Hallam, as his name also appears, was the personal attorney of Marinda Hovey, and shortly before her death had been consulted and retained by her to bring a divorce action, and from the evidence presumably was well acquainted with her affairs.

It also appears, as admitted in the record, that William Kern, Sr., purchased the Nebraska 800-acre ranch in 1905, paying $6,000 in cash and assuming a mortgage of $2,000, taking the title in his own name. The evidence of the defendants is to the effect that William Kern, Sr., made a preliminary payment of $100 with the purpose of having his sons examine the land thus purchased before completing the transaction. The oral understanding between the father and sons at that time was that, if the land suited the sons, the sons were to break out the sod, farm and cultivate it, make necessary improvements thereon, and pay a share of the income to the father during his lifetime, and, upon his death, should become each the owner of his own share therein.

Without unduly extending this opinion by recital of the evidence, it may be said that the evidence of the defendants, if believed, fairly establishes the making of this oral agreement and substantially complies with the same; thus, for example, in addition to labor performed, Richard Kern, a son of William Kern, Sr., testified that he expended $1,800 in cash in improvements made by him on this land; and, also, the testimony of William Kern, Jr., another son, is that he contributed over $2,000 for the same purpose.

On October 24, 1912, William Kern executed his last will devising the 800-acre ranch, subject to a life estate in his wife, to his children as therein provided. He died October 26, 1912, and during the same year this will was duly admitted to probate.

It also appears that the children of William Kern at the request of their mother conveyed their distributive shares received under that instrument in the real estate of their mother, Marinda Kern. The mother then departed this life at Calloway, Nebraska, on June 27, 1925, leav-

ing a last will and testament bearing date November 10, 1923, which in effect devised the land in controversy to her children, "share and share alike, as tenants in common."

This will of Marinda Kern was duly admitted to probate on the 23d day of July, 1925. The devisees in the will last named constitute the defendants in this case. Plaintiff asserts as against them that the share in the estate of Marinda Hovey to which she was entitled under the terms of the parol agreement before referred to was unlawfully appropriated and converted into money by William Kern, Sr., and his wife, and invested in the real estate in controversy, which constituted, in view of the source of the money invested therein, a trust property to which she is entitled.

It is admitted on behalf of the plaintiff that the adoption papers which were claimed to have been executed for her benefit cannot be produced and were never recorded. It is also to be noted that all of the events referred to in the record relating to the alleged adoption and the oral agreement pursuant to which it was made took place in Iowa; this contract, if ever made, was thus made in Iowa, to be performed in that state, and then related to property which had its situs wholly within the state of Iowa. It is quite obvious therefore that the laws of Iowa are controlling as to all questions of substantive law presented by the record before us, and it may also be said that due proof of the laws of Iowa pertaining to this subject appears in this record.

It further appears that the provisions of the Iowa statute applicable to many of the questions here discussed have been lately construed by the supreme court of that state in *Morris v. Trotter*, 202 Ia. 232. In that case it is said:

"Adoption is statutory. It is not known to the common law. By section 10500, Code of 1924, it is only upon the execution, acknowledgment, and *filing for record of an instrument in writing*, conforming to certain requirements of the preceding sections, that the rights between parent

and child by adoption, including the right of inheritance, shall be the same as between the parents and a child born in lawful wedlock. *Long v. Hewitt,* 44 Ia. 363; *Tyler v. Reynolds,* 53 Ia. 146; *Gill v. Sullivan,* 55 Ia. 341; *Shearer v. Weaver,* 56 Ia. 578; *Bresser v. Saarman,* 112 Ia. 720; *In re Estate of Lamb v. Morrow,* 140 Ia. 89; *Riley v. McKinney,* 167 Ia. 508; *Horner v. Maxwell,* 171 Ia. 660; *Webb v. McIntosh,* 178 Ia. 156; *Young v. McClannahan,* 187 Ia. 1184. See, also, *In re Estate of Taggart,* 190 Cal. 493, 27 A. L. R. 1360; *Fiske v. Lawton,* 124 Minn. 85; *Hood v. McGehee,* 189 Fed. 205."

"In *Webb v. McIntosh, supra,* we said: 'This did not become effective as an adoption, because of the articles being signed by the mayor of an incorporated town, instead of the clerk of courts, as then exacted by section 3251 of the Code; and, as the instrument purports to confer no rights upon the child save as a consequence of her adoption, she is not entitled to specific performance. In other words, the courts will not enforce specific performance of an agreement to adopt. That can only be effected by compliance with the statutes of the state.' The principle so announced is controlling here."

And in the same case that court also declared: "While we have frequently held that adoption may not be accomplished save by an observance of statutory requirements, we have also held that the right to property may be acquired under contractual provisions of a writing that falls short of a statutory instrument of adoption, or even under a parol contract, clearly established, where there had been part performance. *Chehak v. Battles,* 133 Ia. 107; *Stiles v. Breed,* 151 Ia. 86; *Anderson v. Blakesly,* 155 Ia. 430; *Young v. McClannahan,* 187 Ia. 1184; *Daily v. Minnick,* 117 Ia. 563."

It is to be remembered that the evidence offered by plaintiff wholly fails to disclose the terms of the adoption papers which plaintiff claims were executed, and it is conceded that they were never recorded as provided by the Iowa statute. It follows therefore, even if adoption pa-

pers were actually executed as claimed by plaintiff, that fact alone affords her no basis of relief.

On this subject the supreme court of Iowa has further declared the law of that jurisdiction to be that nothing in the chapter relating to adoption requires that anything shall be stated in the adoption papers provided for concerning property rights; that if the instrument of adoption be prepared in strict conformity with the statute, with a view to recording, and with the sole object of effecting adoption, it is not to be considered a contract within the meaning of the term, but rather to be regarded as a compliance in form with statutory provisions. Nor do these statutes undertake to authorize and regulate contracts. They are intended rather to give the right of inheritance which does not arise from contract but from law. *Jordan v. Abney,* 97 Tex. 296. In the instant case, owing to the failure to record, the purpose of executing the instrument was thereby defeated and it rendered nugatory. In view of the fact that the regulation of property rights forms no necessary part of its purpose, the instrument of adoption cannot be specifically enforced when not recorded as required by section 3252 of the Iowa Code. *Webb v. McIntosh,* 178 Ia. 156.

In view of this situation we are relegated in the consideration of this case to the sole controlling question of whether or not the evidence in the record establishes as a fact that plaintiff has "acquired rights of property" under a parol contract, clearly established, and of which there had been a part performance, without reference to and wholly uninfluenced by the alleged execution of adoption papers. The trial court, upon due consideration of the testimony contained in the record, much of which was given before it by witnesses in person held: "That no agreement of any kind either verbal or written in form is shown by the evidence to have ever been made between said Marinda Hovey and any other person by which the said Marinda Hovey obligated herself to convey to the plaintiff any portion of her estate."

A careful consideration of all the evidence in the record convinces us that in its finding the trial court is right, and that the plaintiff has wholly failed to clearly establish the existence of a parol contract upon which she relies, and that the action of the trial court in dismissing her petition should be affirmed. In arriving at this conclusion we have not overlooked the evidence offered by the plaintiff as to the claimed oral statements of William Kern, Sr., as to the source of the money invested by him in the lands in suit and as to the alleged rights of plaintiff therein. It may be conceded that the general rule is that declarations by a party in disparagement of his title to property of which he is then in possession claiming to be the owner or otherwise interested therein are competent evidence, but it is also true that "the weight to be given to evidence of admissions may depend upon various matters affecting its accuracy; as, for example, the liability to mistake what has been said, resulting either from the frailty of human memory, the natural inability to detail what has been said by another precisely as it was said, and the liability to purposely distort, color or mistake what was said," and, "consequently the rule is that evidence of admissions, particularly mere verbal admissions, should be received with caution." 1 Ency. of Evidence, pp. 610, 611; 22 C. J. 289, sec. 318.

Particularly is this true when the declaration testified to is sought to be applied or used in the establishment of a controverted fact as to which it affirmatively appears that the declarant has no personal knowledge. In the instant case the declarations of William Kern, Sr., as testified to by plaintiff's witnesses, are sought to be used as the basis of an inference that the transactions between Marinda Hovey and plaintiff's mother were as testified to by the latter; yet the evidence of plaintiff's mother wholly fails to disclose the presence of William Kern, Sr., at the time and place of the transactions referred to in her testimony; and in no manner connects this declarant with such transactions, and, in fact, the evidence as an entirety

substantially negatives his presence thereat. While these declarations thus testified to are, in view of the declarant's relation to the title involved, admissible in evidence, and might indeed be worthy of serious consideration on the subject of the identification of the funds invested in the Lincoln county land, as funds derived from property inherited by the declarant from Marinda Hovey's estate, that, if true, being a fact which would reasonably be within his personal knowledge, they would seem to be entitled to but little weight so far as tending to establish the actual existence of the parol contract of adoption, as testified to by plaintiff's mother. For it is certain that as to the last named transaction the declarant was not present and could have no personal knowledge thereof whatever, and, in fact, as to which he would not be even a competent witness.

But there is a further and additional element involved in this question. William Kern, Sr., the alleged source of most, if not all, of the admissions upon which plaintiff relies to sustain her case had been dead 15 years at the time of this trial in the district court, and almost 10 years had elapsed since the plaintiff had attained her majority and had been fully advised of the facts of the situation. No concealment in the matter by William Kern, Sr., is claimed. "Courts of justice lend a very unwilling ear to statements of what dead men have said." *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493. "Unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence." *Lippert v. Pacific Sugar Corporation*, 33 Cal. App. 198. Where statements were made in loose, casual or random conversation the supreme court of Iowa has announced the conclusion that: "No species of testimony is more dangerous, or received with greater caution." *Cooper v. Skeel*, 14 Ia. 578, 581. As applicable to the subject of proof of admissions of declarants, Corpus Juris, after a discussion of the obvious weakness of this class of testimony, in general, continues as follows: "Ex-

posed to all the infirmities just mentioned and to the further objection that it is impossible, in most cases, to convict the witness of perjury if his testimony is wilfully false, testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subjected to the closest scrutiny." 22 C. J. 291, sec. 319. In principle our own authorities are in substantial accord with the rule thus expressed. *Overlander v. Ware*, 102 Neb. 216; *Williams v. Miles*, 68 Neb. 463; *Clark v. Turner*, 50 Neb. 290.

In this connection the following circumstances have been judicially noticed as tending to impair the credibility of testimony to oral declarations and admissions: That the alleged testimony is inconsistent with the true facts in the case; that the statement is not in harmony with the conduct of the witness or of the declarant; that the witness was not interested in the subject-matter of the conversation and had no reason for giving special attention to it; that the alleged statement was made in the presence of witness alone; that the statement was made many years before, and that the witness is of bad and doubtful character. 22 C. J. 292, sec. 321.

A careful examination of the record in this case justifies the conclusion that it is quite apparent that one or more of the circumstances above enumerated are found in connection with each item of testimony with reference to the "admissions" of William Kern, Sr., upon which the plaintiff relies in this case. Especially is it true that as to each of these admissions it must be conceded that they are utterly inconsistent and out of harmony with the life history of this deceased as preserved in numerous written records embracing many transactions occurring at widely separated intervals and in varied connections.

Therefore, considering the case a trial *de novo* and giving due attention to all the direct evidence and the facts and circumstances appearing in the record, we are impressed with the thought that plaintiff has failed to substantiate her claim as to the making of the alleged parol

contract between plaintiff's mother and Marinda Hovey, upon which plaintiff's rights must be based; nor can her cause of action, in view of the circumstances detailed in the evidence, be sustained by the admissions of William Kern, Sr., and others upon which the plaintiff relies.

It follows that this court is in full accord with the judgment of the district court denying plaintiff relief and directing the dismissal of her petition, which action is therefore hereby

AFFIRMED.

HASTINGS, District Judge, dissents.

EDWARD A. BECK V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26425.

ERROR to the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed as modified.*

J. E. Willits, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

PER CURIAM.

Plaintiff in error, hereinafter designated as defendant, was convicted in the district court for Adams county of unlawful possession of intoxicating liquor, and sentence imposed ordering him confined in the county jail for a period of 60 days. He prosecutes error, and assigns as reasons for reversal, among others, that the judgment is not supported by the evidence, and, further, that the sentence is excessive.

From an examination of the record, we are convinced that the evidence is sufficient to support the verdict of the jury. However, under the peculiar circumstances of this case, we feel that the judgment sentencing defendant to confinement in the county jail for a period of 60 days is

excessive, and that the ends of justice will be subserved by the imposition of a fine.

It is therefore considered by this court that the defendant, Edward A. Beck, pay a fine of $100 and costs of suit, and stand committed and be imprisoned in the county jail of Adams county until such fine and costs are paid. As thus modified, the judgment of the trial court is affirmed.

AFFIRMED AS MODIFIED.

MAX M. OPPFELT V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26574.

Recognizance: INVALIDITY. A recognizance given to effect an appeal by a defendant, who has been convicted of a misdemeanor in the county court, which is conditioned for his appearance "at the next term of the district court," and which fails to require the defendant to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923, is invalid and confers no jurisdiction on the district court.

ERROR to the district court for York county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

A. P. Sprague, for plaintiff in error.

O. S. Spillman, Attorney General, and *Donald Gallagher, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

PER CURIAM.

Plaintiff in error was convicted in the county court of a violation of the liquor statute. He attempted to appeal to the district court and gave a recognizance, conditioned to appear "at the next term of the district court," but the recognizance did not require him to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923. The dis-

trict court dismissed the appeal because of the insufficiency of the recognizance, and defendant brings error to this court.

The record brings the case within the rule announced in *Killian v. State,* 114 Neb. 4, as follows: "A recognizance, given to effect an appeal by a defendant who has been convicted of a misdemeanor in the county court, and which is conditioned for his appearance at the district court on the first day of the next term, instead of forthwith, as the statute requires, is invalid and confers no jurisdiction on the district court."

Counsel for plaintiff in error rely upon *Abbott v. State, ante,* p. 350, wherein it was held: "Where a defendant in a criminal case gave an appeal bond conditioned for his appearance on the first day of the next term of the district court instead of forthwith, but the first day of the next term was the first day upon which the district court sat, and was the first opportunity given defendant for such appearance, and he did appear upon said date without objection being made thereto until after seven terms of court had intervened, *held,* upon objection made to jurisdiction of district court on the ground of invalidity of the bond, that said bond was a substantial compliance with the requirements of section 9999, Comp. St. 1922, as amended by chapter 113, Laws 1923."

The record does not show that the instant case comes within the rule above announced. There the recognizance was conditioned for defendant's appearance on the first day of the next term of the district court, which was, in fact, the first day on which he could appear. It was therefore equivalent to requiring him to appear "forthwith." In the present case, the recognizance was not for appearance on the first day of the next term of court, but for his appearance *at the next term,* which might be at any time during the term. Moreover, he failed to comply with the statute requiring him to abide the judgment of the district court and not depart therefrom without leave, as required by chapter 113, Laws 1923.

The district court did not err in dismissing the appeal. The judgment is

AFFIRMED.

IN RE ESTATE OF L. A. HANSEN.
J. A. BALLANTYNE ET AL., APPELLEES, V. THOMAS A. HANSEN ET AL., APPELLANTS.

FILED NOVEMBER 7, 1928. No. 26063.

1. **Appeal: EXECUTOR'S ACCOUNT: FINAL ORDER.** An order of the county court approving items of the accounts of an executor will not be regarded as final, if at the same time it does not discharge the executor but requires of him further collections and a further report and continues the proceedings to a future date for a further decree upon the filing of such supplemental report.
2. **———: OBJECTION TO JURISDICTION.** An objection to the jurisdiction over the subject-matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal.

APPEAL from the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed, with directions.*

Lyle E. Jackson, Williams & Kryger and *J. A. Donohoe*, for appellants.

Mapes, McDuffee & Mapes, contra.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

GOSS, C. J.

This is an appeal by the executors from a judgment of the district court. The cause had been appealed by certain creditors of the estate from the county court to the district court. The executors had ineffectually moved in the district court to dismiss the appeal from the county court. The matters in controversy were thereupon tried on the merits. On appeal here they were so argued, but

the executors also raised the question of the jurisdiction of the district court to consider the appeal. They base their objection to the jurisdiction on the ground that the order of the county court was not a final order and was not appealable.

We think it unnecessary to state the facts further save as they serve to illuminate the making of the order in the county court.

An order barring claims was entered October 14, 1922. On June 5, 1923, the executors filed a detailed report of the receipts and expenditures to that date, showing, among other things, the payment of interest on mortgages on real estate, the payment of taxes, and payments made to the widow on account of her allowance. On November 23, 1925, the executors filed another report of their receipts and disbursements and petitioned the county court for a final settlement. This was set for hearing on December 21 and notice thereof was published. J. A. Ballantyne and Security Bank of Meadow Grove filed detailed objections to the report of the executors, as did also the Tilden National Bank, challenging expenditures of certain items shown in the report. Issues were joined by a reply to the objections filed by the executors. The matter was not tried by the county court until the 21st day of February, 1926, was taken under advisement by the court until the 19th of March following, whereupon the county court made the journal entry (under consideration here) with detailed findings of fact as to the contested items, and then concluded with an order relating to the estate. This order is particularly important in the consideration of the case now before us. The entire order portion in the journal entry last above referred to is as follows:

"It is therefore considered, ordered and adjudged that this estate be not closed until certain supplemental proceedings be had as follows, to wit: First, that the executors collect from Horace Marshall the sum of $247.00, and, if necessary, shall commence suit in the district court of Antelope county, Nebraska, to recover the same. Second, they shall

upon ten days' notice, by posting five typewritten notices in the City of O'Neill, Nebraska, sell at public auction at O'Neill, Nebraska, the said Oakland Sedan and report the same to this court. Third, that they shall account for and pay into the estate's funds the sum of $44.25, costs in the district court proceedings; that subject to the above modifications the report of the executors is hereby approved; and this estate proceeding is continued to the 26th day of May, 1926, at 10 o'clock a. m. for further decree after receiving the supplemental report herein required of said executors."

It is not deemed advisable to discuss the particular items of the accounts of the executors which were revised by the district court because of the question of jurisdiction of the district court to hear the appeal from the county court. This question, if not raised by the motion to dismiss the appeal from the county court, was raised in the brief and argument of appellants here. This suggests a consideration of our statutes relating to reviews and final orders.

Section 1471, Comp. St. 1922, reads as follows: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby."

Section 9127, Comp. St. 1922, says: "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 9128 defines a final order in the following words: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in

an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

In *In re Estate of Wilson*, 97 Neb. 780, it was held: "Orders of the probate court adjusting or correcting accounts of an administrator, made while he is acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge." In the course of that opinion this language was used: "We have observed no final order of the court discharging the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only and not final orders. *Bachelor v. Schmela*, 49 Neb. 37. The county court, therefore, had complete jurisdiction over the accounts of the administrator until his final discharge." Later a rehearing was ordered in that case and the opinion thereon is found in 98 Neb. 852. The case was reaffirmed as modified, the modification being unimportant here. The syllabus says: "Although notice has been given of final settlement of an estate in probate, and orders are made thereon determining the heirs and fixing their interests and adjusting certain uncontested items of the administrator's account, orders so adjusting items of the account will not be regarded as final, if the administrator is not discharged, and additional collections and disbursements by him are required and a further report necessary."

An inspection of the whole journal entry from the county court in the case before us shows that it contains no findings of heirship and no determination of matters usually decreed on the settlement of final account and distribution of an estate, but that it deals entirely with the accounts theretofore filed, the items thereof and the objections of the creditors named. That part of the entry which we have quoted as containing all of the order and judgment shows on its face that the executors are required yet to do

certain specified things in the way of selling personal property, bringing a suit, if necessary, against one of the creditors who was erroneously overpaid, and by themselves paying into the estate a certain item of costs. The order expressly continues the proceedings to a later date for further decree. It is true that it provides "that subject to the above modifications the report of the executors is hereby approved" but that does not make the order final, for the reason that, so long as the county court retained jurisdiction and held the estate open for further decree, the order approving the report of the executors was subject to change and modification. The order in no sense meets the requirements of the statutes and of *In re Estate of Wilson,* 98 Neb. 852. It was interlocutory and, to paraphrase the language in the case just cited, the county court, therefore, had complete jurisdiction over the accounts of the executors until the court should make an order for their final discharge. It follows that, if the county court had complete jurisdiction over these accounts, the order appealed from was interlocutory and the district court did not obtain jurisdiction of the appeal.

As applied to the history of the instant case, we may state the rule to be that an order of the county court approving items of the accounts of an executor will not be regarded as final, if at the same time it does not discharge the executor but requires of him further collections and a further report and continues the proceedings to a future date for a further decree upon the filing of such supplemental report.

It may be claimed by the appellees here that the motion to dismiss the appeal in the district court was ineptly framed to cover that point. Even assuming that to be true, it may be stated as fundamental that, where a judicial tribunal has no jurisdiction of the subject-matter, its proceedings are void. An objection to the jurisdiction over the subject-matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal.

7 R. C. L. 1042. The jurisdiction of the district court over the suject-matter could arise only on appeal from a final order in the county court. Under the statutes and our holdings the order sought to be appealed from was not a final order. The district court had no jurisdiction to consider the merits and should have declined so to do. Its review of the action of the county court and its judgment in the premises was void.

The judgment of the district court is reversed, with instructions to dismiss the appeal from the county court and to require such dismissal to be certified to the county court.

REVERSED.

BURTON GORTON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1928. No. 26314.

1. **Indictment**: EMBEZZLEMENT: TIME. Time is not necessarily an element of embezzlement and may not affect the proceedings in a prosecution for that offense, though the exact date on which it was committed is inaccurately stated in the information.
2. **Embezzlement**: SUFFICIENCY OF EVIDENCE. Under a charge of embezzlement on a day named, evidence of a continuous series of accused's previous conversions in different amounts at different times may support a verdict for the aggregate sum as a single embezzlement.
3. ———: VARIANCE. Under an information charging the embezzlement of a specific sum of money at various times between two dates named, checks by which accused procured such money may be admissible in evidence, though a bill of particulars furnished by the prosecution gave the date of each check as the date of a conversion in the series instead of a subsequent date on which the money was received and converted, there being no material variance between the bill of particulars and the proofs in that respect.
4. **Criminal Law**: MOTION FOR NONSUIT. Where competent evidence is sufficient to sustain a conviction in a criminal prosecution, an order overruling a motion for an involuntary nonsuit is not erroneous.
5. **Embezzlement**: CHECKS: ADMISSIBILITY. Checks may be ad-

missible in evidence in connection with other proof that accused used them to procure money he was charged with embezzling.

6. ———: INSTRUCTIONS. Where instructions as a whole make "felonious intent" essential to a conviction under a proper charge of embezzlement, a single instruction is not necessarily erroneous to the prejudice of accused merely because "fraudulently converted" is used in a single instance instead of the former expression.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

D. W. Livingston, John M. Dierks and *A. P. Moran,* for plaintiff in error.

O. S. Spillman, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

ROSE, J.

In a prosecution by the state in the district court for Otoe county, Burton Gorton, defendant, was accused of embezzling at various times from August 1, 1924, to April 4, 1927, $54,926.52 belonging to the Dunbar Grain Company, a corporation of which he was manager. Upon a motion by defendant the state was required by the court to furnish a bill of particulars showing separately the items aggregating the amount of the embezzlement charged and the date of each item. The county attorney furnished a list of 88 items amounting to $54,926.52 and varying in amounts from $11.65 to $5,614.72, with dates beginning August 27, 1924, and ending March 23, 1927. When arraigned defendant pleaded not guilty. Upon a trial of the case the jury rendered a verdict of guilty as charged in the information and fixed the amount of the embezzlement at $1,900. A motion for a new trial was overruled and the district court imposed a sentence requiring defendant to serve a term of not less than one year nor more than two years in the state

penitentiary. As plaintiff in error defendant has presented for review the record of his conviction.

The principal argument of defendant is directed to the proposition that there was error in the overruling of a motion to direct an involuntary nonsuit on the ground that the evidence, when confined to the bill of particulars, was insufficient to sustain a verdict of guilty. In discussing this point defendant invokes the rule of law that competent proof of a felony is limited to the alleged unlawful acts specified in the bill of particulars furnished by the prosecution. He earnestly insists that the proofs of embezzlement, if any, do not correspond to the items enumerated in the bill of particulars. The evidence was sufficient to justify the jury in finding the following facts beyond a reasonable doubt:

The Dunbar Grain Company was a corporation engaged in buying and selling grain and in operating an elevator at Dunbar. From the beginning defendant was the manager. In that capacity he had charge of the corporate business and property. He was authorized to buy grain from farmers in the vicinity of the elevator and to store, sell and deliver it. It was his duty to check against the account of the Dunbar Grain Company in the Dunbar State Bank in paying for grain purchased at the elevator. It was also his duty to keep books of accounts showing the corporate transactions of his principal. Occupying the Dunbar Grain Company's office in the elevator, he was engaged in the duties of manager until the board of directors met to consider the condition of affairs April 6, 1927. At short intervals from August 27, 1924, until March 23, 1927, defendant drew checks against the account of his principal in the Dunbar State Bank and used the proceeds to speculate in options on the board of trade through the Duff Grain Company of Nebraska City, a corporation with which he kept an account in his own name. Neither the Dunbar Grain Company nor its board of directors authorized the use of corporate funds for the purpose of dealing in options

on the board of trade. They did not know that defendant as manager had used money of the corporation for that purpose until he called them together and disclosed the facts April 6, 1927. The money so used was taken by defendant without their consent. There was abundant evidence of the facts narrated.

It was in the situation outlined that the county attorney filed the information accusing defendant of embezzling $54,926.52 on various dates beginning August 27, 1924, and ending March 23, 1927. The items in the bill of particulars correspond generally to the amounts and dates of the checks through which defendant procured the money of his principal and used it on the board of trade. Most of such checks were drawn on the Dunbar State Bank against the account of the Dunbar Grain Company. They were payable to the Duff Grain Company and the drawer was the Dunbar Grain Company, by Burton Gorton, manager. The checks were indorsed by the Duff Grain Company, credited by it to the personal account of defendant and subsequently marked "paid." In most instances a check was cashed on the day following its date or a little later. Over objections the checks were admitted in evidence.

The contention of defendant seems to be that a particular act of embezzlement, if committed, did not occur before the proceeds of the corresponding check were credited to his personal account with the Duff Grain Company—a date subsequent to that of the check as stated in the bill of particulars. Reasoning from that premise he argues that the check was not admissible in evidence because, as he contends, it was outside of, and did not correspond to, any item in the bill of particulars. The position thus taken is untenable.

Time is not necessarily an element of embezzlement and may not affect the proceedings in a prosecution for that offense, though the date is imperfectly stated in the complaint. Comp. St. 1922, sec. 10074; *Rema v. State*, 52 Neb. 375. In both the information and the bill of particu-

lars the date of the last act of conversion is shown. Under a charge of embezzlement on a day named, evidence of a continuous series of accused's previous conversions in different amounts may support a verdict for the aggregate sum as a single embezzlement. *Bolln v. State,* 51 Neb. 581; *Chamberlain v. State,* 80 Neb. 812. The first step in each act of embezzlement in the series charged was the issuance of a check and its date was correctly stated in the bill of particulars. Defendant was thus advised in advance of his initial move in each particular transaction involved in the entire charge against him. All the checks were drawn by him in the name of his principal. The entries showing their issuance were made by him in the accounts of the Dunbar Grain Company. The bill of particulars identified his first step in each felonious transaction by giving the date of the check instead of the date on which it was cashed—a day or so later. Defendant, therefore, was not without notice of the charge to be met by him, nor was he misled or prejudiced in his defense by the bill of particulars. There was no material variance between the date of the check and the date of the completed act of embezzlement as charged and as shown by the evidence. Proved items in the bill of particulars far exceed in amount the verdict of the jury. The checks were the means by which defendant procured from the Dunbar Grain Company the money found by the jury, upon sufficient competent evidence, to have been embezzled. The checks were admissible also to show the manner in which defendant transacted the business of his principal. *Chamberlain v. State,* 80 Neb. 812. In addition, the record contains evidence that defendant voluntarily admitted he "played the board of trade" through the Duff Grain Company and that he was short in his corporate accounts about $14,000 when deposed as manager. The checks were properly admitted in evidence and the trial court did not err in overruling the motion by defendant to direct a verdict in his favor.

In further argument defendant also advanced the proposition that the charge of embezzling money cannot be

proved by evidence that checks were embezzled. In this particular there was no variance between the information and the proofs. The embezzlement of checks was not in issue. It is well-settled criminal law that checks may be admissible in evidence in connection with other proof that accused used them to procure money he was charged with embezzling. That defendant thus procured money from his principal and embezzled it is shown beyond a reasonable doubt as found by the jury. The point is not well taken.

Other assignments of error are based on the proposition that the trial court erred in giving instructions in a form that permitted the jury to return a verdict of guilty without finding the "felonious intent" essential to a conviction for embezzlement. The specific point is that the term "fraudulently converted" was used instead of "felonious intent." The trial court first instructed the jury that the information contained the charge that defendant "did unlawfully and feloniously and fraudulently take, embezzle, make way with and convert to his own use" the money of the Dunbar Grain Company, stating the amount. In the later instruction criticised the term "fraudulently converted," as applied to the money taken, was supplemented or modified by the clause "as charged in the information." Felonious intent was inferable from circumstances, from evidence of irregularities in the accounts kept by defendant, from his taking and converting to his own use money of his principal, and from his attitude upon the disclosure of his shortage. The instructions as a whole made felonious intent essential to a verdict of guilty. The assignments of error under this head are therefore overruled.

Other assignments have been considered without finding any error prejudicial to defendant. He had a fair and impartial trial and his sentence was merciful.

AFFIRMED.

FIRST STATE BANK OF HERRICK, APPELLEE, V. G. HARLEY CONANT, APPELLANT.

FILED NOVEMBER 7, 1928. NO. 25989.

1. **Bills and Notes:** SIGNING RENEWAL: CONSIDERATION. Where A, the maker of a valid promissory note, procures B to become a comaker of a renewal note, whereby time of payment is extended, such extension of time constitutes a valid consideration for the signature of B.
2. **Evidence:** STATUTES OF SISTER STATE: PRESUMPTION. In the absence of pleading and proof to the contrary, the statutes of a sister state are presumed to be the same as those of this state.
3. **Banks and Banking:** INSOLVENCY: SOUTH DAKOTA STATUTE: SUPERINTENDENT AS TRUSTEE. Under the statutes of South Dakota, as pleaded and set out in the opinion, when the superintendent of banks of that state takes over the property and business of a state bank, he acts as a trustee for the bank, its creditors and stockholders. Under such circumstances, the bank and the stockholders are beneficiaries of the statutory trust so created.
4. ———: ———: ———. Under the statutes of South Dakota, as pleaded and set out in the opinion, a state bank does not cease to exist when the state superintendent of banks takes over the property and business of the bank, but such bank continues as a legal entity until it is finally liquidated.
5. ———: ———: ———: RIGHT OF ACTION. Under the statutes of South Dakota, as pleaded and set out in the opinion, the superintendent of banks of that state, when he takes possession and control of the business and property of a state bank, is authorized to sue and collect obligations due the bank, and he may sue in the name of the bank, of which he is trustee.
6. ———: ———: ———: ———: PARTIES. Under the statutes of South Dakota, as pleaded and set out in the opinion, when the property and business of a state bank is taken over by the superintendent of banks, and an action is brought upon a promissory note in which the bank is named as payee, the bank is the real party in interest and the proper party plaintiff in such action.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELY, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Congdon, Finlayson & Burke, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

On a prior submission of this cause to division No. 1 of the supreme court commission, an opinion was prepared and adopted, reversing the judgment of the district court. The cause is now before us on rehearing.

Plaintiff brought this action upon a promissory note, in which it was named as payee, against one of two co-makers. To the answer of defendant plaintiff interposed a general demurrer, which was sustained, and, defendant refusing to further plead, judgment was rendered for plaintiff in the amount of the note and interest. The defendant appealed.

The only question presented for determination is whether or not the answer states a defense to the action. In his answer defendant admits the execution of the note, and, for a defense, alleges that the plaintiff bank suspended business on March 28, 1924, a year previous to the execution of the note in suit, and that plaintiff has since been in the hands of the superintendent of banks of South Dakota, with Joseph H. Schmid, examiner, in charge, and further alleges that the indebtedness represented by the note arose March 26, 1923, and was represented by a note to the First State Bank of Herrick, signed by one G. C. Conant; that said note was renewed and the renewal note fell due March 26, 1924, two days before the bank suspended business; that upon request of the plaintiff the maker of the note, G. C. Conant, secured the signature of the defendant upon said note, and that no consideration was given to the defendant for signing said note. It is further alleged that sections 8925, 8927, 8928, and 8938, of the South Dakota Revised Code of 1919, provide, in substance, as follows:

"If the superintendent of the bank (superintendent of banks) shall have reasons to conclude that a bank is in an

unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue in business, he may forthwith take possession of the property and business of such bank and retain possession until such bank shall resume business or its affairs be finally liquidated, and upon taking possession of the property and business of any bank, such superintendent shall be authorized to collect all moneys and debts due to such bank, and it may upon order of the court sell or compound bad or doubtful debts and sell any and all real and personal property of such bank."

Defendent further avers that thereupon the superintendent of the banks of South Dakota became the owner and holder of the debt represented by the note sued upon herein, and had no authority whatever to accept and receive the note sued upon, and thereby extend the time of payment of said debt until December 1, 1925. Defendant denies specifically that plaintiff was the owner and holder of the note in controversy and the real party in interest. He further alleges that defendant was an accommodation signer of said note, having signed the same without any consideration, and that he is not liable thereon.

The answer clearly indicates that there was a valid obligation of G. C. Conant owing to the bank in 1923, and that it was renewed in 1924; that on a second renewal of the note the maker procured the defendant to sign the note with him, and that time of payment was extended. Clearly, the extension of time was a consideration for the defendant signing the note. It was not necessary that the consideration should move directly to the defendant. It was sufficient that his comaker received an advantage and benefit in having the time for payment of his obligation extended. Thereafter, defendant and his comaker again renewed the note while it was in the possession and under the control of the superintendent of banks of the state of South Dakota. The facts set forth in the answer are insufficient to show that defendant signed the note without consideration or that he is an accommodation maker.

Under the negotiable instruments act, the maker of a negotiable promissory note engages that he will pay it according to its tenor and admits the existence of the payee and his then capacity to indorse. In the absence of pleading and proof to the contrary, the statutes of South Dakota are presumed to be the same as those of Nebraska, and, under the negotiable instruments act of this state, the defendant is not in a position to deny the capacity of the payee of the note to extend the time of a former note by taking a new note, signed by the same parties.

The real question, and the one principally relied upon by the defendant, is the right to maintain this action in the name of the bank when the bank is in the hands of the superintendent of banks of South Dakota and subject to his control, on the theory that plaintiff is not the real party in interest.

From so much of the statute of South Dakota as is pleaded, it would appear that, when the superintendent of banks of South Dakota shall have reason to conclude that a bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue in business, he may take possession of the property and business of such bank and retain possession until such bank shall resume business or its affairs be finally liquidated, and, upon taking possession of the property and business of any bank, the superintendent is authorized to collect all money and debts due such bank.

From the provisions thus pleaded, it appears that the superintendent of banks takes over the property and business of the bank and acts as a trustee for the creditors of the bank and for the bank and its stockholders. If the business of the bank is placed in a safe and sound condition, possession and management thereof may be returned to the officers and stockholders. If it is not placed in such condition, it may be liquidated, and, if liquidated after the payment of all just obligations of the bank, undoubtedly the surplus, if any, would be returned to the

stockholders. The stockholders of the bank are, therefore, among the beneficiaries of the trust created by statute.

The bank does not cease to exist when possession is taken by the superintendent of banks, but continues as a legal entity unless and until it is finally liquidated. If the officers and stockholders restore the bank to a safe and sound condition, the management of its affairs and the assets would be returned to the bank. The bank itself is therefore a beneficiary of the trust. The assets and bills receivable which were taken over by and remained in possession of the superintendent of banks were presumably payable to the bank. By statute he is authorized to collect, and when he collects any of the debts due the bank he is collecting for the bank. The assets, reduced to money, will be returned to the bank or paid to its creditors, as the case may be. When the superintendent of banks extended the time and took a renewal note, it was likewise for the benefit of the bank, or for the benefit of the creditors of the bank, as the facts may ultimately determine. The bank was the beneficiary of, and entitled to, the note, or the proceeds thereof, subject only to the payment of the debts and obligations of the bank. When the superintendent of banks took possession and charge of the bank and its business, the right of the officers of the bank to manage its affairs was, for the time, suspended, and such right became vested in the superintendent of banks. While the statute authorized him to sue and collect, it did not require that he should sue in his own name. He might sue in the name of the bank, which he represented, in lieu of its officers.

The national banking act contains provisions very similar to those of the South Dakota statute set out in the answer. Whether a receiver of a national bank should sue in his own name or in the name of the bank which he represents, to collect obligations due the bank, has been frequently before the United States supreme court.

In *Kennedy v. Gibson*, 75 U. S. 498, it was held that the receiver of a national bank is the statutory assignee of a

banking association and is the proper party to institute all suits; that they may be brought both at law and in equity and in his name, or in the name of the association, he representing both the creditors and the association. This ruling was followed in *Bank of Bethel v. Pahquioque Bank,* 81 U. S. 833, *First Nat. Bank of the Metropolis v. Kennedy,* 84 U. S. 19, and *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.,* 104 U. S. 54.

The supreme court of Alabama, in *Montgomery Bank & Trust Co. v. Walker,* 181 Ala. 368, held that the superintendent of banks, in charge of an insolvent bank, is, in reality, a receiver of such bank and has power to sue in the name of the bank. And in *McWhirter v. First State Bank,* 182 S. W. (Tex. Civ. App.) 682, the supreme court of Texas held that an action to realize assets may be maintained in the name of the bank which is in the hands of a special agent, appointed by the commission of banking to wind up its affairs. Moreover, this court has on several occasions held that "The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name." *Hartzell v. McClurg,* 54 Neb. 316; *Greeley State Bank v. Line,* 50 Neb. 434. These decisions have been cited with approval in *Leavitt v. Bell,* 55 Neb. 57, and *Smith v. Potter,* 92 Neb. 39. In *Bon Homme County Bank v. Dakota Nat. Bank,* 50 S. Dak. 191, the supreme court of South Dakota held that the receiver of a bank represents the bank and its creditors; that, in an action brought in the name of the bank by the receiver, the defendant may assert his defenses against the receiver. The opinion approved the bringing of an action in the name of the bank, although it was in the hands of the state superintendent of banks.

Since the superintendent of banks is acting for the bank, he is authorized to maintain an action in the name of the bank. It will be observed that the answer nowhere alleges that the action is brought without authority from the superintendent of banks of South Dakota. In fact, when it is alleged that the bank is in the possession

and under the control of the superintendent of banks, and the statute making it his duty to collect, the presumption is that he has directed and authorized the instant action.

Section 8525, Comp, St. 1922, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 26 (8528)." Section 8528, in part, provides: "A person with whom or in whose name a contract is made for the benefit of another * * * may bring an action without joining with him the person for whose benefit it is prosecuted."

If, as contended by the defendant, the superintendent of banks of South Dakota is to be regarded as holding a legal title to the note in controversy and to be the real party in interest, it would seem that the contract, or note, was made after the title had vested in the superintendent; that it was made in the name of the plaintiff bank, and that the transaction would fall within the provisions of section 8528, Comp. St. 1922.

In 1 Joyce, Defenses to Commercial Paper (2d. ed.) 826, sec. 609, it is said: "The party to whom a note is made payable being *prima facie* the owner, it is held that his right to maintain an action cannot be questioned, except the defendant pleads payment or offset against the party who he alleges is the true owner of the note. So it is no defense to an action on a note that it was given to the payee, in lieu of three other notes, given to the husband of the payee. The widow might be acting as executrix in her own wrong, or might be the heir; in either case the notes surrendered would be satisfied"—citing *Riley v. Loughry*, 22 Ill. 97.

In the instant case it will be observed that no valid defense to the note was pleaded. From what has been said it is evident that the judgment rendered in favor of the bank will be subject to the control of the superintendent of banks, and that a satisfaction of that judgment will be a satisfaction of the note and relieve the defendant of any further liability thereon. No doubt, the action could be maintained in the name of the superintendent of banks.

However, we are of the view that the bank, being the beneficial owner of the note, is the real party in interest and that the action, therefore, was properly maintained in its name.

No prejudicial error is disclosed. The opinion of the commission heretofore adopted and the judgment rendered thereon are vacated and set aside, and the judgment of the district court is

AFFIRMED.

J. W. ROGERS, RECEIVER, APPELLEE, V. H. H. SELLECK ET AL.: NILS LINDQUIST, APPELLANT.

FILED NOVEMBER 10, 1928. No. 26342.

1. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: CONSTITUTIONAL PROVISIONS. The constitutional provision imposing upon bank stockholders a double liability to creditors in the event of insolvency and the constitutional provision that, in all cases of claims against corporations, the exact amount justly due shall be ascertained and the corporate property exhausted before enforcement of such liability must be considered together. Const., art. XII, secs. 4, 7.
2. ———: ———: ENFORCEMENT. The terms of the constitutional provision imposing upon stockholders of a state bank a double liability are by construction embodied in the contracts of subscription for bank stock but cannot be enforced until the exact amount justly due in all cases of claims against the bank has been ascertained and the corporate property exhausted.
3. ———: ———. The double liability imposed by the Constitution upon stockholders of a state bank inures to the benefit of unpaid creditors of the bank, and not to the bank in its corporate capacity.
4. ———: ———: ENFORCEMENT. In effect the constitutional provision imposing a double liability upon stockholders of a state bank requires them, in connection with their subscription for stock, to make contributions to a trust fund for the benefit of unpaid creditors in the event of insolvency, and the action to enforce their obligations must be prosecuted by one creditor for the benefit of all or by the receiver.
5. **Equity**. In actions at law, a course of litigation permitting unnecessary trials, repeated appeals, discouraging delays and

wasteful costs and expenses should be avoided where a single suit based on recognized principles of equity jurisdiction would prevent such consequences.

6. ———: MULTIPLICITY OF SUITS. The preventing of a multiplicity of suits in connection with other grounds of equitable cognizance may justify a court of equity in entertaining jurisdiction.

7. **Banks and Banking**: LIABILITY OF STOCKHOLDERS: REMEDY. The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders. Dicta to the contrary in *Burke v. Scheer*, 89 Neb. 80, and in *Dickinson v. Kline*, 96 Neb. 435, disapproved.

APPEAL from the district court for Morrill county: EDWARD F. CARTER, JUDGE. *Affirmed.*

Paul H. Eaton and *R. O. Canaday*, for appellant.

C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

ROSE, J.

This is a receiver's suit in equity for the benefit of all the creditors of an insolvent state bank against all the stockholders to recover in money and to distribute the entire par value of the stock or the double liability imposed by the state Constitution and by the contracts of subscription.

The insolvent was the Broadwater Bank, a corporation organized under the laws of Nebraska to transact a commercial banking business in Morrill county. The capital stock, paid in full, consisted of 250 shares, each of the par value of $100, or $25,000 in all. There were 15 stockholders and the individual ownership of shares varied from 1 to 141. Upon insolvency of the bank J. W. Rogers was appointed receiver to wind up its affairs. In the proceeding for that purpose it was decreed that the exact amount justly due from the bank to its creditors was $194,116.42;

that all corporate property was converted into money and exhausted; that the proceeds were applied on the indebtedness, leaving unpaid $141,220.17 in liabilities incurred by the bank while defendants were stockholders. The receiver was directed by the court to bring this suit and did so, alleging in detail the foregoing facts, pleading the double liability imposed by the Constitution, naming the stockholders and indicating the share or shares of each, setting forth multiplicity of actions at law in connection with other grounds of equitable jurisdiction, averring there was no adequate remedy at law, and praying for an order on each defendant to perform his obligation, for judgment in the event of default, for distribution of the collected fund among the creditors and for general equitable relief.

Nils Lindquist, a defendant and a stockholder owning one share of the par value of $100, the full amount of his alleged double liability, demurred to the petition in equity herein on the grounds that he is improperly joined with other defendants; that the court is without equitable jurisdiction, and that the remedy of plaintiff, if any, is an action at law against each stockholder.

The demurrer was overruled. Lindquist refused to plead further and judgment was rendered against him for $100. From that judgment he has appealed.

Does the petition of the receiver state facts sufficient to constitute a cause of action cognizable in a court of equity? In resisting the 100-dollar claim, based on the liability imposed by the Constitution and assumed in the contract of subscription, is Lindquist, the owner of one share of the insolvent bank's capital stock, entitled as a matter of right to a jury trial in a technical action at law wherein he alone is defendant? These are difficult questions presented by the appeal with argument and citation of authorities on both sides. The nature of the liability created by the Constitution and the remedy of the unpaid creditors of the insolvent bank are subjects of inquiry. According to the allegations of the petition the stockholders are accountable

in a proceeding of some kind under the following provision of the Constitution:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." Const., art. XII, sec. 7.

Another provision of the Constitution is in this form:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Const., art. XII, sec. 4.

The sections quoted must be considered together. *Hastings v. Barnd,* 55 Neb. 93; *State v. German Savings Bank,* 50 Neb. 734; *Bodie v. Pollock,* 110 Neb. 844; *State v. Farmers State Bank,* 113 Neb. 497. The terms of the constitutional provisions are by construction embodied in the contracts of subscription for bank stock and the liability imposed upon and assumed by the stockholders is contractual, but cannot be enforced until the exact amount justly due in all cases of claims has been ascertained and the corporate property exhausted. *Bourne v. Baer,* 107 Neb. 255; *State v. Banking House of A. Castetter,* 116 Neb. 610. The double liability inures to the benefit of unpaid creditors, and not to the bank in its corporate capacity. *Hamilton Nat. Bank v. American Loan & Trust Co.,* 66 Neb. 67. In effect the constitutional provision imposing a double liability upon bank stockholders in a state bank requires them, in connection with the subscriptions for stock, to make contributions to a trust fund for the benefit of unpaid creditors in the event of insolvency, and the action to enforce their obligations must be prosecuted by one creditor for the benefit of all or by the receiver. *Pickering v.*

Hastings, 56 Neb. 201; *Van Pelt v. Gardner*, 54 Neb. 701; *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593; *Hastings v. Barnd*, 55 Neb. 93. In enforcing the contractual obligations the receiver, acting under directions of the court, is a proper party to bring the necessary action, whatever its nature. *State v. Farmers State Bank*, 113 Neb. 497.

It is conceded by counsel for Lindquist that a suit in equity for the benefit of all the creditors against all the stockholders would be a proper remedy, if the par value of the stock or the maximum liability imposed by the Constitution exceeded the unpaid indebtedness of the bank. What is thus conceded is in harmony with a recognized rule of equity jurisdiction. It is confidently asserted, nevertheless, that an action at law against the individual stockholder is the exclusive remedy where judgment for the maximum liability or for the entire par value of the stock is sought, as in the present case. Is the nature of the remedy changed from equity to law merely because a recovery for the full par value of the stock is sought instead of a less amount? On that question the utterances of this court are not harmonious and there seems to be a diversity of opinion elsewhere.

Lindquist insists that his obligation is several, not joint; that there is no community of interest in law or fact between him and other stockholders joined as defendants; that, sued as an individual for a specific sum of money, he has a right to a jury trial where he alone is defendant; that all the stockholders cannot be joined in equity to prevent a multiplicity of suits. There is a view of these propositions in which the remedy and the convenience of the unpaid creditors seem to be overlooked.

The stockholders united in a common purpose to procure from the state a charter to conduct a commercial bank with permission to deal with the public in an enterprise affected with a public interest. It required the joint action of all subscribers for stock to accomplish that pur-

pose. They gave to their banking corporation joint credit to the extent of the subscriptions. In addition to the $25,000 paid for the capital stock the stockholders assumed a contractual obligation imposed by the Constitution in the nature of a seconary liability or guaranty for the payment of $25,000 to the creditors in the event of insolvency and the exhausting of the corporate assets, if the bank's indebtedness in that sum should remain unpaid. In view of the facts alleged in the petition and admitted by the demurrer, the secondary obligation or double liability is as binding as the primary agreement to pay for the stock in the first instance.

There is more to plaintiff's case than the invoking of equity to prevent a multiplicity of suits. Enforcement of the liability imposed upon all the stockholders for the purpose of creating a common trust fund for the protection of all the creditors and for distribution among them, each to receive only a partial payment on his claim, are questions for determination in this suit.

If each stockholder in the present case has a right to a separate jury trial, the creditors, or the receiver for them, will be required to bring fifteen suits, three within the jurisdiction of a justice of the peace; seven others within the jurisdiction of the county court; five others within the jurisdiction of the district court. In connection with the constitutional provisions Lindquist bound himself by contract to contribute $100 to the trust fund. In a separate action at law for that sum the forum of original jurisdiction would be the court of a justice of the peace. From judgment on a verdict there Lindquist would have the right of appeal to the district court. Another jury trial would follow in the usual course of procedure. In the event of a second adverse verdict he could appeal to the supreme court. Other stockholders would have a right to pursue the same course. Owing to costs, expenses and delays, such litigation, to a great extent at least, would be unprofitable to both creditors and stockholders, would make per-

formance of the contractual liability difficult and expensive, if not useless, and thus defeat the purpose to create the trust fund under which the stockholders jointly procured the charter for the bank and obtained corporate credit.

In a court of equity the trust fund to which the creditors are entitled could be speedily collected and disbursed in a single suit without depriving a stockholder of the opportunity to plead and prove any defense available to him in either law or equity.

In solving the question of jurisdiction the convenience and the rights of the stockholders are not the only factors. The rights and conveniences of creditors should have equal consideration. A course of litigation permitting unnecessary trials, repeated appeals, discouraging delays and wasteful costs and expenses should be avoided where a single suit based on recognized principles of equity jurisdiction would prevent such consequences.

The rights of the creditors and the liabilities of the stockholders had a common source in the conditions imposed by the Constitution and in the contractual obligations assumed thereunder. Except in amount the claims of the different creditors in the present suit in equity are alike, requiring the same proofs. The law and the facts essential to defenses are also of a similar nature in some respects at least and may be the same. In advance the stockholders were joint participants in the banking enterprise requiring the adoption of a method for the raising, collecting and disbursing of a trust fund to protect the creditors in the event of the bank's insolvency. On the day of reckoning they should not be permitted to scatter and waste the trust fund in separately defending actions at law. Each stockholder should be interested in the performance of his own contract and in like performance by other stockholders upon whom all creditors of the bank confidingly relied. Business rectitude and justice should inspire a community of interest among the stockholders.

Jurisdiction in equity has been sanctioned by text-writers to prevent a multiplicity of suits. 1 Pomeroy, Equity

Jurisprudence (4th ed.) secs. 245-251; 10 R. C. L. 283, sec. 28. In the present instance, however, there are, in addition to that ground, other equitable considerations already mentioned. In discussing the double liability imposed by the Constitution this court once said:

"Quite early in the history of this country there were frequently inserted in the charters of corporations provisions fixing the individual liability of stockholders in certain contingencies. When there were presented cases in which it was sought to render effective these special provisions, the courts differed among themselves as to the nature of this liability, the character of the fund arising from it, the persons entitled to sue, and the manner in which the action should be brought. These four matters of difference, on examination, will be found to depend on one question, and that is whether this liability is to be deemed to have been created for the purpose of raising a trust fund for the payment of the debts of the corporation, or whether it created the relation of debtor and creditor directly between a creditor of the corporation and one of its stockholders. If the fund derived from this liability should be deemed a trust fund of the nature suggested, it naturally resulted that an equitable action was recognized as proper, with its concomitants of parties, beneficiaries, and relief." *Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353.

Referring to that case it was said by a unanimous court in a later opinion:

"It was expressly decided that the liability of a stockholder in a banking corporation under the provisions of section 7, article XI, of the Constitution, is for the creation of a trust fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted by one creditor of the corporation for the benefit of all, or by the receiver when one has been appointed. That was an action at law by a creditor of the State Bank of Ainsworth against one of the stockholders thereof to collect an amount equal to the par value of his stock, and it was ruled that the action could

not be maintained. The action should be for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court. *Van Pelt v. Gardner,* 54 Neb. 701; *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593. These decisions are directly in point, and, if adhered to, must control the disposition of the case under consideration. There is a conflict in the adjudications of other courts on the subject, but the rule announced by this court in the foregoing cases is the most just and equitable one, and, being sustained by the better reason as well as authority, will not be now departed from." *Pickering v. Hastings,* 56 Neb. 201.

The syllabus in the latter case is as follows:

"It is the settled doctrine of this court that the liability of a stockholder in a banking corporation, under the provisions of section 7, article XI, of the Constitution, is for the creation of a fund for the benefit of all creditors, and an action to enforce such liability must be prosecuted for the benefit of all the creditors of the corporation against all the stockholders within the jurisdiction of the court." *Pickering v. Hastings,* 56 Neb. 201.

The remedy for enforcement of the double liability imposed by the Constitution was also considered in *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593, and it was therein distinctly held by a unanimous court that the proper proceeding was a suit in equity for the benefit of all the creditors against all the stockholders, the opinion quoting with approval from a Massachusetts case *(Harris v. Dorchester,* 23 Pick. (Mass.) 112) the following language relating to similar liabilities imposed by the legislature of that state in one section of a statute:

"The evils and inconveniences of attempting to enforce this section by suits at common law would be incalculable; and such remedy would be inadequate, vexatious, and mischievous. The only proper means of giving effect to this provision is by a process in equity, and this, of all cases which can arise, seems to call most loudly for chancery

jurisdiction. To a bill in equity all persons, however numerous, might be made parties, and all the relative and conflicting claims of the many creditors and stockholders settled and their proportionate rights to recover, and liabilities to contribute, adjusted in a single suit. We are all, therefore, of opinion that this case comes within the equity jurisdiction of the court and that an action at law will not lie."

What was once judicially declared to be "the settled doctrine of this court" seems to be somewhat unsettled by two later cases upon which Lindquist relies in the present case. One is *Burke v. Scheer,* 89 Neb. 80, a case involving the collection of assessments from members of a mutual hail insurance company to pay losses. A provision of the act under which the company operated prescribed a remedy by suits at law to enforce payment of assessments. The court so held. Without referring to former decisions holding that the remedy to enforce the maximum liability of stockholders of a state bank is a suit in equity, the opinion in *Burke v. Scheer,* 89 Neb. 80, contains dicta of a different import. What was not necessary to a decision in that case was followed in *Dickinson v. Kline,* 96 Neb. 435. In the latter case the insolvent was not a banking corporation and the action was one for the recovery of unpaid subscriptions for stock. Under the facts it was held that the proper remedy was a suit in equity and the rulings relating to the remedy were summarized in the syllabus as follows:

"The proceedings against the stockholders of an insolvent corporation by or in behalf of the creditors of the corporation to recover the full amount for which each stockholder is liable as fixed by his contract must be an action at law in which defendant is entitled to trial by jury. When the amount for which each stockholder is liable is unknown, but must be determined in the action, and depends upon equities to be adjusted among creditors or stockholders, or both, the action must be in equity." *Dickinson v. Kline,* 96 Neb. 435.

In the opinion there is no direct reference to the constitutional provision relating to the double liability of stockholders in banking corporations nor to former decisions holding that the remedy to enforce that liability to the full extent of the par value of the stock is a suit in equity. In so far as *Burke v. Scheer*, 89 Neb. 80, and *Dickinson v. Kline*, 96 Neb. 435, are at variance with the earlier cases cited herein, the dicta are disapproved.

Another recent case cited in oral argument was *Hill v. May*, 115 Neb. 690. The controlling question therein decided is not involved in the present inquiry. The opinion properly holds that a suit on a promissory note given by a stockholder for an assessment of stock to restore the reserve or the solvency of a bank was an action at law.

Upon a consideration of the whole controversy the earlier cases cited are followed and the conclusion is that the proper remedy to enforce the maximum liability imposed by the Constitution upon stockholders of an insolvent state bank is a suit in equity against all of them for the benefit of all the creditors. This is the view taken by the district court and the judgment below is

AFFIRMED.

STATE, EX REL. ROY STEPHENS, RELATOR, V. FRANK MARSH, SECRETARY OF STATE, RESPONDENT.

FILED NOVEMBER 10, 1928. No. 26783.

1. **Political Parties**: FORMATION. Where, pursuant to the provisions of section 2125, Comp. St. 1922, there is attempted to be formed a new political party for placing in nomination candidates that may be voted for by the electors of the entire state, it is essential that there be held a mass convention, in which not less than 500 electors of the state shall be present and participating; that such mass convention shall adopt a party name; that electors to the number of 500 or more shall sign a petition or agreement to form such new party and support its nominees at the next election, and that such petition or agreement shall be signed either at the time of or subsequent to the holding of the mass convention.

2. **Elections**: NEW POLITICAL PARTY: CERTIFICATE OF NOMINATION: OBJECTIONS: DUTY OF SECRETARY OF STATE. Where a certificate of nomination, regular on its face and accompanied by an agreement or petition, purporting to be signed by 500 or more electors of the state, placing in nomination candidates of a new political party for state offices, is filed with the secretary of state, and, within the time prescribed by law, objections to such certificate of nomination are filed with that official, he is authorized to investigate not only matters of form, but to determine from extrinsic evidence whether or not a convention, such as is required by law, was, in fact, held to form such new party and place candidates in nomination.
3. ———: ———: ———: PETITION: REJECTION. Where there is presented to the secretary of state a certificate of nomination, regular in form, purporting to show the nomination of candidates for state office by a new political party, and which is accompanied by a petition or agreement, purporting to be signed by less than 500 electors of the state, agreeing to the formation of such new party and to support its nominees at the next election, the secretary of state should decline to accept and file such certificate, because the accompanying agreement or petition is not signed by 500 or more electors of the state.

Original proceeding in mandamus by the State, on the relation of Roy Stephens, against Frank Marsh, Secretary of State. *Petition dismissed.*

J. A. Brown and *I. E. Ferguson,* for relator.

O. S. Spillman, Attorney General, and *George W. Ayres,* for respondent.

GOOD, J.

This is a statutory proceeding before a justice of the supreme court, wherein the relator, Roy Stephens, claiming to be the chairman of the state central committee of the workers' party, seeks a summary order against the respondent, the secretary of state, requiring him to accept and file certificate of nominations and additional petition of qualified voters, and to certify the nominees of said workers' party as candidates, to be voted upon by the electors of the state at the election on November 6, 1928.

The proceeding is instituted pursuant to the provisions of section 3, ch. 108, Laws 1925, which, in so far as applicable, is as follows:

"All certificates of nomination or nomination statements, which are in apparent conformity with the provisions of this article, shall be deemed to be valid, unless objections thereto shall be duly made in writing within ten days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence as given in the certificate of nomination * * * on file in that office. * * * The officer with whom the original certificate was filed * * * shall, in the first instance, pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the second Wednesday preceding the election. Such order may be made summarily upon application of any party interested, * * * and upon such notice as the court or judge may require. The decision of the secretary of state, or the order of the judge or supreme court justice, shall be binding on all other county, municipal or other officers with whom certificates of nomination are filed."

The proceeding is strictly statutory and is somewhat akin to a mandamus proceeding.

In his petition relator avers that he is a qualified elector of the state, chairman of the state central committee of the workers' party, a new political party of this state, duly organized in accordance with the laws of the state. He further avers that on the 19th of August, 1928, in the city of Omaha, a convention, composed of more than 500 qualified electors, was held for the purpose of organizing a new political party, adopting a party name and nominating candidates for various public offices, to be voted upon at the general election in November, 1928; that said convention resolved to form a political party, adopted the name

"The Workers' Party," and made nominations for president and vice-president of the United States, for governor of the state of Nebraska, for congress for the second district, and for the various state offices; that on August 20, 1928, a certificate was filed with the respondent, showing the holding of such convention, the forming of a new party, the adoption of a party name, and the nomination of candidates for the various offices mentioned, and that at the same time there was filed with respondent a list of 683 signatures of persons who described themselves as electors of the state, and that they agreed to associate themselves together, to form the workers' party, to affiliate therewith, and to support its nominees at the general election, to be held in November, 1928; that said certificate and agreement were in all respects in conformity with the statutes of the state, and that it then became the duty of respondent to accept said certificate and petition as valid, unless objection should be made in writing within ten days, and that no notice was given to respondent of the filing of any objections until the 24th day of September, 1928; that on said date a hearing was held by the respondent at which, it appeared, there was a written protest filed against the placing of the candidates of the workers' party upon the ballot, but that said protest did not go to the ground that either the convention, or the certificate of nomination filed, was insufficient or defective, but that nevertheless respondent made an investigation, and on the 28th of September determined that the workers' party was not properly organized; that the petition or agreement of qualified voters, filed with the respondent, was defective, in that it did not contain sufficient signatures of registered voters, and that the workers' party was not duly organized and its nominees were not entitled to a place upon the official ballot. In the petition it is further alleged that on the 28th day of September, 1928, a convention of more than 500 qualified electors of the workers' party was held at the Sun Theater in the city of Omaha, and again resolved to organize a political party, to be known as the workers' party, and

nominated as candidates the same persons who had been nominated at the so-called convention on August 19; that thereafter certificates of nomination were prepared, together with an agreement signed by 432 electors, agreeing to form the workers' party, to support its principles and its nominees, and such certificate and agreement were, on October 5, 1928, tendered to the respondent for filing; but that respondent refused to accept or file the same.

To this petition an answer was filed by respondent in which it is admitted that relator is a qualified elector of the state. The answer admits the filing of the certificate of nomination, purporting to show that a convention of over 500 electors of the state had been held for the purpose of forming a new party, to be known as the workers' party, and nominating a ticket; admits that objections were filed against the placing of the names of the nominees on the official ballot; admits that he, respondent, held a hearing to determine whether the candidates of the so-called workers' party should be placed upon the official ballot, and that he found that the workers' party was not legally organized and that the nominees were not entitled to a place upon the official ballot; and denies the other allegations of the petition. Further answering, he alleges that there were not 500 electors present at the so-called convention on August 19, 1928; denies that 500 electors signed the petition or agreement filed with the certificate of nomination on August 20, and denies that a mass convention was held on the 28th day of September, or that 500 qualified electors were present at the meeting held at that time and place, or that any legal convention was held, or that the workers' party was ever legally organized.

Section 2125, Comp. St. 1922, provides: "In order to form a new party there shall be present at a mass convention electors to the number of at least five hundred in a state convention." Section 2126, Comp. St. 1922, requires that such convention shall adopt a party name, and electors to the number of 500 shall sign an agreement to

form such new party and support its nominees at the next election, such certificate and agreement to be filed with the secretary of state.

Upon the hearing of this matter evidence was adduced on behalf of both parties. The evidence of relator tends to prove that more than 500 were present at the so-called convention held on August 19, 1928, while the evidence on behalf of respondent tends to show that not more than 200 persons were present. The evidence is in conflict. The evidence further shows that some of those persons were children. It is not disclosed how many of the persons were electors. So far as the evidence discloses only two are positively shown to be electors; nor is it shown how many persons participated or attempted to participate in the deliberations of the convention. It is a matter of common knowledge that many persons, other than those belonging to a political party, frequently attend such conventions as interested spectators. No record was made of the persons attending, or of those participating in the alleged convention; nor was there any showing that more than two or three of them were electors. Section 2125, Comp. St. 1922, requires a convention of 500 electors. Relator utterly fails to show that a valid convention was held.

Relator argues, however, that that question is not open for determination at this time; that the secretary of state was authorized only to conduct a hearing when a protest was filed which named the grounds on which the protest was based; that such protest was in the nature of a pleading, and that the secretary of state was not authorized to investigate or determine any objection not set forth in the written protest. The protest filed was within the time prescribed by statute, and was informal in its nature. However, it was therein suggested to the secretary of state that the protestant doubted whether a legal convention had been held and requested the respondent to investigate and determine the question. The statute nowhere makes any provision as to the nature of the protest, but provides

that if a protest is filed it is the duty of the secretary of state to conduct the hearing.

A very similar question was before the supreme court of Nebraska in *State v. Allen*, 43 Neb. 651, wherein it was held: "It is provided by said act that all certificates of nomination which are in apparent conformity therewith shall be deemed valid unless objection is made thereto; that in case objections are made candidates shall be notified and the officer with whom the certificate is filed shall pass on such objections, and his decision will be final unless a further order is made by the county court, a judge of the district court, or a justice of the supreme court. *Held*, that such officer, in the consideration of objections, is not confined to mere formal matters relating to the certificate of nomination, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by the convention or assemblage of voters or delegates claiming to represent a party which cast the requisite number of votes at the last election." In the course of the opinion it was said (p. 660): "What was the duty of the respondent in regard to the so-called 'Sturdevant ticket'? It is by section 9 of the Australian ballot law provided that the secretary of state shall immediately, upon the expiration of the time for filing certificates of nomination with him, certify such nominations to the several county clerks. By section 11 it is provided: 'All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed valid unless objections thereto shall be duly made in writing within three days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby. * * * The officer with whom the original certificate was filed shall, in the first instance, pass upon the validity of such objection, and his decision shall be final unless an order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court.' It is claimed on behalf of the respondent that he is, by the pro-

vision quoted, required to determine all objections which may be interposed to any certificate, both formal and substantial. On the other hand, it is contended that his jurisdiction extends to matters of form only, and that in no event can he look beyond the certificate itself for the purpose of inquiring into the regularity of the nomination. The reluctance of courts to decide between rival factions of political organizations is proverbial, and is illustrated by the following, among the many cases in point: * * * In the case at bar the claim of the relators rests upon the certificate alone. If they were placed in nomination by a convention, or even by a faction of the democratic party, that fact does not appear from the record. We are fully in sympathy with the sentiment to which expression is given in the cases cited, and are not unmindful of the abuses liable to follow from the entrusting of such extraordinary power to a mere ministerial officer and usually political partisan. But are we not, according to the doctrine of those cases, merely 'escaping the perils of Charybdis to perish in Scylla'? However strongly we may condemn the doctrine that to the secretary of state, or other officer exercising similar functions, is intrusted the power to determine questions of the character under consideration, equally to be deplored is an interpretation which limits his inquiry to matters of form only and requires him to recognize every paper having the semblance of a certificate of nomination regardless of the source from which it emanates, or whether or not such nominations were in fact made in this manner or by the agencies authorized by law.

"Briefly stated, our conclusion is that, while it is not the province of the secretary of state under our system to decide between rival factions of a party where each faction has made nominations, he should, in case of objection, ascertain from the record, or from extrinsic evidence, whether such candidates or either of them were in fact placed in nomination by a convention or assemblage of voters or delegates claiming to represent such party."

The courts of this state are therefore committed to the doctrine that it is within the province of the secretary of state, when a protest is filed, to investigate not only matters of form, but to determine whether or not a convention, such as is required by law, was, in fact, held to form a new party and place candidates in nomination. This the secretary of state did, and rightfully determined that a legal convention was not held on August 20, 1928, and that the certificate of nomination, purporting to be made at such convention, was invalid and did not entitle the nominees to be certified as such and placed upon the official ballot.

It is urged by relator that it was the duty of the secretary of state to accept the certificate of nomination and the agreement, purporting to be signed by 432 electors, tendered to him on October 5, and to use the petition or agreement, with the names of 683 persons, which had been filed on August 20, as a part of the nomination papers of the convention, held on September 28.

The contention is not valid for the following reasons: The preponderance of the evidence shows that at the convention held on September 28 there were less than 500 present, and there is no showing as to how many of those present participated in the deliberations, or how many were, in fact, electors. It does not appear, therefore, that any valid convention was held on the 28th day of September, and, although the certificate tendered was in due form, it was not accompanied by an agreement signed by 500 electors, as provided by statute. Unless the petition or agreement, which was filed on the 20th of August, should be considered as a part of the nomination papers tendered for filing on October 5, the respondent was justified in refusing to accept the nomination papers tendered on the 5th of October. That the list of persons signing the agreement on the 20th of August cannot be considered in connection with the nomination papers filed October 5 seems clear. The statute certainly would not contemplate that any body of electors would agree to support the nominees

of a party several weeks in advance of the formation of such party, before they could know who the nominees would be and before they could know what principles the party would enunciate or support. If such a petition could be prepared and signed four or five weeks before the organization of the party, it might be done as many months or even years before the organization of such party.

We think the statute, fairly and liberally construed, contemplates that the agreement or petition, to be signed by the voters, agreeing to form a new party and support its nominees, must be signed at the time the mass convention is held, or subsequent thereto. The agreement may be formulated and signed at the same time that the convention is held, or at any time subsequent thereto, but it cannot precede the holding of a convention. The certificate and agreement, which were tendered to the secretary of state on the 5th of October, 1928, did not comply with the law because the agreement or petition lacked the signatures of 500 electors. The respondent was, therefore, justified in refusing to accept or file the same.

We conclude that relator is not entitled to the relief demanded or any part thereof, and it is therefore considered and adjudged that his petition be dismissed and that he pay the costs of this proceeding.

PETITION DISMISSED.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, PLAINTIFF, V. WILLIAM T. WALLACE ET AL., DEFENDANTS.

FILED NOVEMBER 10, 1928. No. 26349.

1. Animals: TUBERCULOSIS ACT: CONSTITUTIONALITY. Section 10, art. II, ch. 12, Laws 1927, relating to the testing of cattle for tuberculosis, examined, and *held*: (a) Applicable to the entire state; (b) not arbitrary or unreasonable; (c) not in violation of section 18, art. III of Constitution of Nebraska, or section 1 of the Fourteenth amendment to the Constitution of the United States.
2. **Case Followed.** *State v. Heldt*, 115 Neb. 435, followed.

3. **Record** examined, report of referee approved, and injunction granted.

Original action by the State, on the relation of the Attorney General, against William T. Wallace and another for an injunction. *Injunction granted.*

O. S. Spillman, Attorney General, and *Peterson & Devoe,* for plaintiff.

Cook & Cook, for defendants.

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

This is an original action instituted in this court by the plaintiff seeking to restrain and enjoin the defendants, as and for the purposes hereinafter indicated. A restraining order, on notice duly given, was issued and served. Thereafter an answer was filed by the defendants. Later, by agreement of the parties in open court, the restraining order was slightly modified, and, as modified, continued; and Honorable Harry L. Norval of Seward was appointed as referee to take evidence and report findings of fact and conclusions of law, which he did. The issues, as well as the further proceedings had before such referee, are evidenced by his report, which is now before us, and is in the words and figures following:

"Report of Referee.

"This is a direct action brought in this court by the state of Nebraska, on the relation of the attorney general, against the defendants William T. Wallace and J. B. Montgomery, to restrain and enjoin them from obstructing or preventing, by force or otherwise, the department of agriculture of the state of Nebraska, and its authorized agents, inspectors and employees from entering the premises, pastures and enclosures wherein defendants' cattle may be, in Dawson county, Nebraska, for the purpose of inspecting and applying the tuberculin test to said cattle.

and to enjoin the defendants from moving, or causing their breeding cattle to be moved from Dawson county, to other counties, without having them tuberculin tested, and from interfering in any manner with said department of agriculture, its agents or employees, from carrying out a plan of tuberculosis eradication in Dawson county, Nebraska.

"The state predicates its right to apply the tuberculin test to the breeding cattle of the defendants on the provisions of chapter 12, of the Session Laws of Nebraska for the year 1927, and on section 10, of article 2, of said chapter 12.

"Section 10, above referred to, provides as follows: 'Where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any preexisting legislation of this state, or where, prior to the passage of this act, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than five thousand cattle have been tested in such county prior to the passage of this act, the inspection, examination and testing of cattle for tuberculosis in such county or counties may be continued by the department under the provisions of this act without petition or hearing in all respects as if such petition had been filed and hearing had and the county declared an area hereunder.'

"The defendants' contentions, as set forth in their brief submitted, are as follows:

"1. That the facts as established by the evidence do not entitle plaintiff to an injunction, assuming that section 10, art. 2, chapter 12, Laws of 1927, is valid, and assuming that Dawson county has been shown by the evidence to be within the class specified by said section 10.

"2. That the evidence does not establish that prior to the passage of chapter 12, Laws of 1927, a systematic inspection, examination and testing of cattle for tuberculosis

had been undertaken in Dawson county, on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle tested thereunder prior to the passage of said chapter 12.

"3. That section 10, art. 2, ch. 12, Laws of 1927, is in violation of section 18, art. 2, Constitution of Nebraska, and of section 1, Fourteenth amendment, Constitution of the United States, and is void, and that article 2, ch. 12, Laws of 1927, is not in force in Dawson county.

"Findings of Fact.

"The evidence discloses that prior to the passage of the 1927 act referred to, and in January, 1925, there was on file in the office of the department of agriculture of Nebraska petitions signed by 64 per cent. of the owners of breeding cattle of Dawson county, representing 80 per cent. of the cattle owned in said county, and that, prior to the passage of said act of 1927, a systematic inspection, examination and testing of the cattle in said county for tuberculosis was carried on, on a cooperative basis, by the United States bureau of animal industry and the department of agriculture of Nebraska, and that 51,757 cattle in said county were so tuberculin tested; that reports were made of the result of the tests; one filed with the United States bureau of animal industry, and the other with the department of agriculture of the state of Nebraska, and that owners of cattle in Dawson county received indemnities prior to the passage of the act of 1927, by both the state and federal government, for cattle disposed of by the two departments, which were found to be infected with tuberculosis. Rules and regulations for the eradication of the disease, which had first been adopted by the United States bureau of animal industry, were adopted and followed by the department of agriculture of Nebraska.

"After the legislative act of 1927 became effective, the department of agriculture of the state of Nebraska promulgated rules and regulations to enforce and effectuate the general purpose and provisions of the act, which were

admitted by the parties to have been properly posted as required by law, and on the 27th day of July, 1927, the state department of agriculture entered an order, which was approved by the governor, declaring Dawson county to be an area for the inspection, examination and testing of breeding cattle for tuberculosis. The state department of agriculture likewise caused a notice to be published in a legal weekly newspaper in Dawson county, Nebraska, in which notice was given that the inspection, examination and testing of cattle for tuberculosis in said county, would commence on, or as early after October 31, 1927, as possible.

"The testimony discloses that veterinarians operating as such under authority from the state department of agriculture conversed with the defendants in November, 1927, and requested of them that they be permitted to test the dairy and breeding cattle of the defendants for tuberculosis, and that the defendants each specifically refused to permit them to do so. The defendants admit that they refused to permit them to make the test, and that they now continue in such refusal.

"The defendants' cattle were kept in pastures in Dawson county, Nebraska, and, at about the time this action was instituted, a portion of the cattle were removed to different pastures within the county, which necessitated their being taken through other grazing lands in which other breeding and dairy cattle were kept.

"Conclusions of Law.

"There is ample evidence in the record to sustain the proposition that the defendants have refused to permit the state department of agriculture, and its agents, to make an inspection, examination and test of defendants' cattle for tuberculosis, as alleged.

"The authority of the state department of agriculture to make such an inspection, examination and to test the dairy and breeding cattle of the defendants for tuberculosis in Dawson county depends, first, on two propositions,

either of which is authority for the department to proceed in that respect:

"The state department may make such inspection, examination and test under the provisions of section 10, article 2, of the Laws of Nebraska for 1927, where any county has been declared an area for the inspection, examination and testing of cattle for tuberculosis under the provisions of any legislative act existing prior to the act of 1927.

"Under said section 10, it may also make such inspection, examination and test in other instances where, prior to the passage of the act of 1927, a systematic inspection, examination and testing of cattle for tuberculosis has been undertaken in any county on a cooperative basis by the United States bureau of animal industry and the Nebraska department of agriculture, and more than 5,000 cattle have been tested in such county prior to the passage of the 1927 act.

"The requisite jurisdictional steps required to be taken before the department of agriculture proceeded were complied with. Before the passage of the act of 1927, a systematic inspection, examination and testing of cattle for tuberculosis was extensively undertaken in Dawson county, under a cooperative basis between the state and federal departments, and some 51,000 tests actually made therein.

"The validity of the statute providing for the inspection and testing of cattle to determine the presence of tuberculosis in cattle, and the destruction of such animals where the disease is found prevalent, is a proper exercise of the police power of the state in the interest of the public health, and as a protection of the live stock industry. The statute in question is not violative of any constitutional provision. Under section 10, article 2, of chapter 12, of the Laws of 1927, the legislature provided for the making of such inspection and test in any county which had been declared an area for the making of such inspection under preexisting legislation, and also in other instances where inspection had been previously made in a systematic man-

ner on a cooperative basis by the state and federal departments of agriculture, and a specified number of cattle had been tested. The statute applies to the entire state, and is not special in its nature. In counties coming under either of the provisions of said section, the department of agriculture was vested with jurisdiction to continue such inspection.

"If, as defendants contend, the section in question is special legislation, still it is within the power of the legislature to enact such special legislation covering the matters involved in this suit, where, in its judgment, the subject or matters sought to be remedied could not be properly remedied by a general law, and where the legislature has a reasonable basis for the enactment of the special law.

"While the legislature cannot arbitrarily and unreasonably make classifications by legislation, it has the right to make reasonable classifications where the law will operate equally to all within the same class. The legislature selected a means of accomplishing the eradication of tuberculosis by the establishment of areas in which such eradication work should be carried on at public expense. Its effect was to place some thirty-eight counties into an equal number of special inspection districts, some of which had been declared such areas under preexisting legislation, and others where a designated amount of inspection had been made on a cooperative basis by the state and federal government. The operation of the law to other counties or districts to be created was left to the local option of the breeding cattle owners of the several counties, and inspection could be made when petitions signed by the requisite number of cattle owners have been filed, and proper proceedings and hearings had thereunder.

"The legislature is not prohibited under the Constitution from passing local or special laws, on the subject under consideration, unless it is prohibited by the provisions of section 18, article 3, of the Constitution of Nebraska, which provides: 'In all other cases where a gen-

eral law can be made applicable, no special law shall be enacted.'

"It is for the legislature to determine whether the purpose for which it legislated could be properly accomplished by a general law. It does not appear that the determination of the legislature was arbitrary or unreasonable, or that it was without a sufficient basis to justify the enactment in every respect. In view of the different conditions existing in the numerous counties in which tuberculin tests had been made, and the conditions in other remaining counties of the state, the general law could not have been made applicable, which would have probably reached the situation as it existed prior to the enactment of the 1927 act, in all of the counties of the state.

"Thousands of dollars of public money had been expended by both state and federal government to eradicate tuberculosis in some thirty-eight counties before the act of 1927. These counties were in an entirely different situation from the remaining counties. If the benefits of the work then accomplished prior to the enactment of the 1927 law was to be protected, it was necessary that the legislature place those counties in a different classification from the other counties in the state. A general law, which would have operated alike in all counties, and had granted to each county local option requiring cattle to be tested anew in the same manner, would have resulted in a destruction of the benefits which had accrued up until that time in the counties where extensive tests and large expenditures had been made.

"But it is apparent that, under section 10, the legislature merely defines when and under what conditions the department of agriculture is vested with jurisdiction to commence or continue its work of eradication.

"The state appears to have fully established its case and is entitled to the relief prayed for, and the defendants and each of them should be enjoined from in any manner obstructing, or preventing the state department of agriculture, or any of its officers, agents or inspectors from en-

tering the premises where defendants' cattle may be in Dawson county, for the purpose of applying the tuberculin test to their said cattle, and from carrying out and enforcing the laws of the state of Nebraska, relating thereto, including the rules and regulations relating to said eradication promulgated by said state department.

"Harry L. Norval, Referee."

The challenges to this report are substantially those urged before the referee and by him considered, and are as indicated by such report; and largely involve the provisions of section 10, art. II, ch. 12, Laws 1927, heretofore quoted.

The facts as found by the referee are amply supported by the pleadings, and sustained by the evidence introduced, and such findings, are approved. Further, it is found that the conclusions of law contained in such report are correct, and they are affirmed. In this holding we are but following the rule announced in the recent case of *State v. Heldt*, 115 Neb. 435, in which an able and exhaustive opinion was written by the late, lamented member of this court, Judge George A. Day. This opinion covered the entire act in question as it existed then, and, by favorable chance, as it exists now in so far as it relates to the matters reflected by this record, as the material amendments made to the act by the legislature of 1927 which affect this suit were, apparently, practically all inspired by suggestions contained in such opinion. The only serious weakness that Judge Day found in the act was as to section 9 thereof, and this weakness consisted in the fact that the title of the 1925 act, then under consideration, was not broad enough to include such section 9. This fault was remedied by the act of 1927. He also, in such opinion, conserved the best interests of the state by impliedly at least suggesting a means of safeguarding the benefits of moneys and services theretofore expended or rendered by the state in any county, which, as we conclude, inspired the enactment of section 10 hereinbefore quoted.

As we are satisfied with the report of the referee as to

conclusions of law and fact, also with the reasons leading up to each thereof, further discussion would serve no useful purpose. The motion to confirm the report of the referee is sustained, and the objections filed to such report are overruled.

The restraining order and injunction, as modified, and now in force, is made perpetual, and costs of suit are taxed to the defendants.

INJUNCTION GRANTED.

ARTHUR LINDLEY V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1928. No. 26444.

1. **Criminal Law**: PLEA OF NOT GUILTY: EFFECT. Ordinarily, a plea of not guilty waives all matters which might have been raised by motion to quash or plea in abatement, and before the defendant can urge such a motion or plea he must withdraw his plea of not guilty. However, in this case, the record being without a complaint, and the defendant's plea of not guilty having been inadvertently lodged, no issue was raised by reason thereof, hence it was not necessary that such plea be withdrawn before interposing a challenge to the right of the court to proceed.
2. ———: TRIAL: LOST COMPLAINT. Where the original complaint in a misdemeanor case appealed to the district court is lost, or is not at the command of the court or either party, it is error for such court, over timely and proper objections interposed by defendant, to proceed with the trial, until such complaint is before it, or a new complaint covering the same offense is substituted on application of the state.

ERROR to the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed.*

H. A. Bryant, for plaintiff in error.

O. S. Spillman, Attorney General, and *Harry Silverman, contra.*

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

THOMPSON, J.

Plaintiff in error, Arthur Lindley, hereinafter designated

as defendant, was prosecuted and convicted for violations of the liquor law. The action was instituted on complaint of the county attorney of Saunders county in the justice court of H. Reader, and change of venue taken to the justice court of H. J. Woodworth, where trial was had and defendant found guilty on each of the three counts charged in the complaint, to wit: (a) The unlawful transportation of intoxicating liquor for the purpose of sale; (b) the unlawful sale of intoxicating liquor; and (c) the unlawful possession of intoxicating liquor, as a second offense. Appeal was taken to the district court, where defendant appeared in open court, waived the reading of the complaint, and pleaded not guilty to each count. Trial was had and defendant again convicted, and he prosecutes error to this court.

We will first consider claimed errors of law occurring in the trial of the case in the district court. The record discloses that the original complaint was not before such court, or at the command of either party for the purpose of the trial. This fact was discovered before the impaneling of the jury, and the following objection was interposed on the part of defendant: "At this time, and before the calling of the jury, the defendant objects to any further proceedings herein for the reason there is no complaint or information filed in this court against the defendant." The objection was overruled, and defendant compelled to proceed to trial on a purported copy of a complaint, which copy formed a part of the justice's transcript.

Ordinarily, a plea of not guilty waives all matters which might have been raised by motion to quash or plea in abatement, and before the defendant can urge such a motion or plea he must withdraw his plea of not guilty, as held by us in *Green v. State*, 116 Neb. 635, wherein will be found the statute there applicable, as well as our previous holdings on the subject. In those cases there was a complaint or information on file, and thus an issue was joined by reason of the interposition of the plea of not guilty. Not so in this case; the record being without a complaint and the plea

of not guilty having been, as we find, inadvertently lodged, no issue was raised by reason thereof. Such plea was without force or effect, and withdrawal thereof was unnecessary.

This brings us to the challenge, did the trial court commit reversible error in forcing the defendant to trial on the record as it then stood? Section 9999, Comp. St. 1922 (being section 324 of the Criminal Code, Gen. St. 1873), as amended by chapter 113, Laws 1923, provides the manner in which such appeals may be taken, and is, so far as here material, in substance, that the recognizance must be entered into within ten days after the rendition of such judgment, which recognizance must be conditioned for defendant's appearance forthwith, at the district court of the county, and from day to day thereafter to answer the complaint against him. The magistrate from whose judgment the appeal is taken shall make return of the proceedings had before him, and shall certify the complaint and the warrant together with the recognizance to the district court. Section 10001, Comp. St. 1922 (being section 325 of the Criminal Code, Gen. St. 1873), provides: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same as if the original complaint had not been set aside." We have repeatedly held that the statutes governing such appeals were mandatory, and thus as to the rights of appeal on the part of the defendant they should be strictly construed. Thus, where the statute provides that a recognizance shall be entered into by sureties, if only one is provided the appeal must be dismissed. *Whetstone v. State,* 109 Neb. 655, and cases cited. In *Kazda v. State,* 52 Neb. 499, we held a recognizance invalid which failed to designate the court before which the defendant is to appear. In the case of *In re Newton,* 39 Neb. 757, under section 324 of the Criminal Code, herein-

before referred to, we held the recognizance must be entered into within 24 hours after rendition of judgment.

Applying these holdings to the case at bar, we have seen the law requires that the recognizance shall provide for defendant's appearance in the district court to answer the complaint; that is, the original complaint. However, as we view this record, our holding in *Bays v. State*, 6 Neb. 167, is controlling. In that case the facts were very similar to those involved here. The original complaint was lost. The prosecuting attorney made this manifest to the court, and on motion filed asked leave to file a substituted complaint charging the same offense as that designated in the original, and, over objections of the defendant, was permitted to do so. The case proceeded to trial and judgment. Defendant prosecuted error, and in the course of our opinion we said: "We think our statute, although it does not in direct terms provide for this particular contingency, clearly recognizes the practice here adopted" (quoting section 325 of the Criminal Code, now section 10001, Comp. St. 1922). Then, we further said in such *Bays* case: "It is evident that, under this provision, no matter how utterly deficient the complaint sent up by a magistrate may be, even if totally wanting in the essential requisites to show the offense intended to be charged, the prosecution will not be thwarted, but 'the court shall order a new complaint to be filed,' upon which the trial must proceed. This section establishes a positive rule of practice by which the courts are of course bound whenever the original complaint is found to be defective. And it does more than this; it furnishes a safe guide to the courts in matters of practice whenever a contingency shall arise, which, although not within the letter, is clearly within the spirit of the statute. In the practice of the courts contingencies not unfrequently arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights. It seems to us that there is quite as much neces-

sity and reason for the substitution of a new complaint when the original is *lost* as there is when found to be merely defective in form or in substance."

The rule as thus announced is plain, practical, and efficient, and is adhered to.

It is therefore determined by us that the objection to the court proceeding with the trial without the original complaint, or a heretofore indicated substitute thereof before it, was proper, timely interposed, and should have been sustained; and in overruling such objection prejudical error was committed.

The challenge that the verdict does not respond to the issues need not be given consideration, further than to suggest that the form of such verdict is one not to be commended.

This renders it unnecessary to consider the other claimed errors presented.

The judgment of the trial court is reversed and the cause remanded for further proceedings, with leave given the state to produce the original complaint if it can be found; if not, to prepare and file a new complaint covering the same offense.

REVERSED.

LEWIS FORD DENISON V. STATE OF NEBRASKA.

FILED NOVEMBER 10, 1928. No. 26375.

1. **Evidence** examined, and *held* sufficient to sustain the verdict of manslaughter.
2. **Homicide**: INFORMATION: DEGREE OF HOMICIDE: QUESTION FOR JURY. Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference.
3. **Criminal Law**: RES GESTÆ: EXCLUSION OF DECLARATION. Where a participant in a transaction makes a declaration

claimed to be a part of the *res gestæ*, but the words spoken are of such character that the meaning of the speaker cannot be fairly gathered therefrom, it is not error for the court in the exercise of a sound legal discretion to exclude such declaration from the evidence.

4. ———: TRIAL: REMARKS OF COURT. Remarks of the court upon a trial for murder considered and found not to constitute prejudicial error.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sullivan, Ed. P. McDermott, and *Pratt, Hamer & Tye,* for plaintiff in error.

O. S. Spillman, Attorney General, George W. Ayres and *E. G. Reed, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

REDICK, District Judge.

The defendant, Lewis Ford Denison, was charged in the information with the crime of murder in the first degree; he was convicted of manslaughter and sentenced to the penitentiary for a term of seven years, and prosecutes error to this court.

The occasion and circumstances of the tragedy are, to say the least, unusual, and will be briefly stated as furnishing a background for the discussion which follows. The place of the homicide was on a public road near the farm house of one Gabriel Shada, a brother of John Shada, the victim thereof. The Shadas were Syrians, who will be so designated to distinguish them from the crowd of Kearney boys and young men later referred to. On the morning of August 28, 1927, a large number of Syrians had assembled at St. George's Church at Kearney, Nebraska, attending divine service, at which time a baby of John Shada, deceased, was to be baptized. It seems to be a custom among Syrians to celebrate such an occasion by a gathering of the friends and relatives of the father for social

and friendly intercourse, and they were present in large numbers, some from Michigan and some from Iowa, and from different points in the state of Nebraska. The day was also the birthday of John Shada, deceased. At the church, notice was given that all present were invited to the farm of Gabriel Shada, about six and one-half miles east of Kearney, to celebrate the occasion, and in the early afternoon were gathered at the farm some 125 or 150 people, nearly all Syrians; dinner was served and various games were played, the whole affair being in the nature of a large picnic. Among them were John, Gabriel and Charles Shada, with their wives, families and a large number of others who were called as witnesses. John lived at Lexington near Kearney, Charles at Kearney, and Gabriel at his farm.

During the middle of the afternoon, between 3 and 4 o'clock, a crowd of 8 to 10 young men and boys from Kearney came out to Gabriel Shada's farm, apparently for the purpose of "baiting" the Syrians. At any rate there ensued a fight in which the Kearney boys were defeated and returned to town leaving one of their number, Ernest Noble, at the farm, an incident to which reference will be made later. The defendant was not present at this occurrence. Upon the return of the crowd to Kearney a large crowd, variously estimated from 50 to 75 in number of young men and youths was assembled, and headed by a truck in which 8 to 10 were loaded, and followed by about 15 automobiles carrying the others, started for the Shada farm, arriving about 500 or 600 feet west of the gate thereof between 5 and 5:30 p. m., where the cavalcade stopped in a line upon the south side of the traveled road. Before reaching this last destination, and perhaps an eighth or a quarter of a mile west thereof, three automobiles loaded with Syrians returning home were met by the crowd; the the cavalcade was stopped, and many of the men got out upon the road three different times and stopped the automobiles coming west, in each case calling the occupants dagoes and opprobrious names, and, in at least two in-

stances, striking and abusing occupants of the cars; the cars containing men, women and children. None of them were seriously injured and they were shortly permitted to proceed on their way.

When the Kearney cars were stopped at the point above indicated, practically all of the occupants got out and began gathering sticks and clubs and other similar weapons and advanced toward the Shada farm in an uneven line stretching across the road. The approach of the cars from Kearney was noticed by a number of children playing in the road and they ran into the farm, giving the alarm that a big crowd was coming. Thereupon Gabriel Shada, who testified that he told all the others to stay back, walked out onto the road and approached the crowd from Kearney with one or both hands lifted up, and when within 15 or 20 feet of them, as he testifies, he said to them, "Boys, what are you doing here? I don't want no trouble," and thereupon one or more of the Kearney boys jumped at Gabriel and struck him a severe blow on the side of the face, and he turned around toward his own people. John, the deceased, followed Gabriel out onto the road at a short distance, about 15 feet, and a little to the left of Gabriel, facing south and apparently going across the road toward a crowd of Kearneyites assembled on the south side of the road and a little west of John. While John was in that position, facing south, and almost immediately after Gabriel had been struck, a shot was fired from the west, the bullet entering John's neck below the ear and about an inch or an inch and a half back of the angle of the jaw-bone. John put his hand to his face, turned to the right, and started back toward his friends, who by this time had gathered in some numbers in the road. He was taken by his wife and friends to an automobile and thence to Kearney to a hospital, where he died that night as the result of the wound.

Prior to the firing of the shot there had been a number of minor fracases, during which at least two of the Syrians had been struck with clubs, one of them being knocked into the ditch by the side of the road, and there was consider-

able yelling and holloing on the part of the Kearneyites. There was some evidence by the witnesses for the state that two, two or three, or three or four shots were fired, coming from the west, but, if so, only one caused any damage. Some of the defendant's witnesses testified that two or three shots came from the east, and some of them identified Sam Shada as the party who fired them, but all of those witnesses who positively identified Sam Shada testified that he fired in the air and that no one was hurt. The evidence warrants the inference, if more than one shot was fired, that there was a slight pause between the shot which killed John and later ones. At any rate the evidence and circumstances point overwhelmingly to the conclusion that the fatal bullet came from the west or from the north and west at a point occupied by the Kearneyites, and where the evidence shows without contradiction there were no Syrians. Immediately upon the firing of the shot or shots, the Kearney crowd turned and ran back to their cars, and the Syrians, men and women, came into the road in considerable numbers, and the trouble was over.

1. The vital question is: Who fired the shot that killed John Shada? The state did not charge and the case was not tried upon the theory that defendant was a member of a mob or riot during the occurrence of which Shada was killed, but directly charged the defendant with firing the fatal shot, and defendant's first assignment of error is that the evidence is insufficient to support the verdict. It will, therefore, be necessary to briefly review the evidence upon which the state relies, with which we now proceed.

Charles Shada, uncle of deceased, testifies that he saw Gabriel and John go out into the road, and that he followed them, walking down the north side of the traveled portion, westerly; that he was some 20 or 30 feet back of Gabriel, and saw him lift up his hands, but could not hear what he said; that he saw John walking across the road facing the south; that he had known defendant Denison about 20 years, since he was a baby, and had seen him a number of times that summer in Kearney, where witness lived; that

when he got within 15 or 20 feet of Gabriel he saw defendant to the north and a little west of John—"8, 15 or 10 feet from John"—with a revolver in his hand, pointed toward John's ear; that he immediately shouted, "Don't shoot, Denison, I know you;" that immediately thereafter he saw defendant fire the revolver, and that John was in the center of the road facing south when the shot was fired. The bullet entered the right side of the neck below the ear near the angle of the jaw-bone, and its course was a little to the right and upward. These facts corroborate the witness as to the location of the parties, completely demolishing the theory of the defense that John was shot by one of his own people.

Charles Shada is corroborated by his wife, Mary, who testified that she knew Denison, that he was not very far west from Charley, that she saw a little gun in his hand and saw him shoot, that John was in the road not far from Denison, looking south, and that she saw blood in John's mouth.

Reverend Yanney, pastor of St. George's church, heard a shot from the west and a little south from where he was standing in the yard by the road, heard three or four shots close together, but did not see any gun or who shot.

George Shada testified that he was struck and fell into the ditch on the north side of the road, and heard shots from the south and west of him. Nicholas Shada testified that he was going west on the north side of the road and heard Charley say, "Don't shoot, Denison, I know you"—heard three shots from the west close together—thought they were from the same gun—shots were fired just as Charley finished—saw George Shada in the ditch.

George Simon testified that he heard Charley call Denison by name and say, "Denison, I know you, don't shoot," but did not see Denison in the crowd; that just before John was shot he was facing south of west, mostly south.

Amen Shada, son of Gabriel, saw Gabriel going west down the road followed by John who was a little southwest of Gabriel, facing south, when he was hit; heard Gabriel

say, "Don't shoot," then heard two or three shots from the west, from the northwest of John.

Denison was identified by witnesses both for the state and defendant as wearing a leather jacket. Rosie Miller, testified that she was in the first car stopped by the Kearney crowd west of Gabriel Shada's place, and that a number of boys jumped onto the running-board of her car, among them one wearing a brown leather jacket, who had a pistol in his hand; she did not know defendant Denison at the time, but subsequently positively identified him as the boy with the leather jacket, picking him out from eight or ten young men who had been arrested and placed in the jail at Kearney. She is corroborated to some extent by her mother, who was with her in the car, as to the transaction on the road. There was considerable other testimony tending to corroborate the state's witnesses on various minor points. There was no direct effort to impeach any of the witnesses called for the state, but they were thoroughly cross-examined by able counsel and some inconsistencies between their evidence upon the trial and at other times were developed. The defendant introduced a large number of witnesses from the crowd that went out from Kearney who gave a description of the events as they saw them, but the only testimony tending to rebut the direct and positive evidence of the state was by several witnesses to the effect that they heard shots coming from the east; that, at the time the shot which killed John was fired, Denison was fighting or wrestling with some one in the ditch at the north side of the road. Two witnesses swore that Charles Shada made statements to the effect that one Nutter was the person who fired the fatal shot, and some contradictory statements of Charles were developed on cross-examination. The defendant himself did not take the witness-stand and we are therefore deprived of any possible benefit which we might have received from a statement of his version of the affair.

The bill of exceptions in this case covers more than 1,500 typewritten pages. It has been most carefully read and

studied with particular reference to this assignment of error, and we have reached the conclusion that the evidence given upon the part of the state, if believed by the jury, was amply sufficient to sustain the verdict. That evidence is practically without direct dispute as to the main facts necessary to sustain a conviction. Its weight and sufficiency and the proper inferences to be drawn from it were for the jury. If the evidence may be deemed conflicting upon the pivotal points in the case, nevertheless, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict, this court will not interfere. *Wheeler v. State,* 79 Neb. 491; *Denker v. State,* 106 Neb. 779; *Ingoldsby v. State,* 110 Neb. 495.

2. The second assignment of error is that the court erred in submitting to the jury the question of defendant's guilt of manslaughter. Section 10155, Comp. St. 1922, provides: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter." But counsel for defendant correctly contends that this statute does not require the submission of a degree or grade of homicide which has no support in the evidence. The contention of defendant on this point is that the evidence introduced by the state in this case admits of only one of two conclusions, namely, that defendant was guilty of murder in the first degree, or murder in the second degree, and that, therefore, if the jury were not convinced beyond a reasonable doubt of his guilt of one of those offenses, he was entitled to an acquittal. The statutes of this state define manslaughter as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Comp. St. 1922, sec. 9546.

Counsel insists that under no view of the evidence in this case would the jury be justified in finding either that the defendant shot John Shada upon a sudden quarrel, or un-

intentionally, while in the commission of an unlawful act. These alternatives will be discussed in their order.

(a) The evidence tends to establish that immediately prior to the shooting several conflicts between individuals of the opposing sides had taken place; that the defendant himself had struck one of the Syrians (identified as George Shada) with a club, knocking him into the ditch on the north side of the road, and with such force as to break the club in two, the portion of which remaining in his hand he then threw to the ground. Then some one on defendant's side struck Gabriel Shada a severe blow, from the effect of which he was dazed and unable to see. Then followed in quick succession the fatal shot. These occurrences took place in less time than it takes to record them—they were incidents of a fight then being carried on between the opposing parties. The jury might well be unwilling, under these circumstances, to find that the defendant acted with deliberate and premeditated malice and was therefore guilty of murder in the first degree; again, they might be unwilling to find that he acted with malice and therefore guilty of murder in the second degree. The state was required to prove malice in order to convict defendent of second degree murder. There is no presumption of malice in this case where all the circumstances of the killing are testified to by eye-witnesses. *Davis v. State,* 90 Neb. 361. To convict of murder in the second degree it is not sufficient merely to prove that the killing was intentional; it must also have been malicious. On the other hand, there is little, if any, question but that a verdict finding defendant guilty of either one of the higher crimes would be sustained by the evidence in this case. The verdict of the jury implies that defendant's act was neither premeditated nor malicious. They do find, however, that defendant killed John Shada, without justification or excuse, because none was offered. Defendant's counsel insists or implies from his argument that it was the duty of the court to analyze and weigh the testimony as to the manner in which the tragedy occurred and determine as a matter of

law that the defendant was not guilty of the crime of manslaughter, notwithstanding the fact that it was well established that under some circumstances the defendant fired the fatal shot. We think this would be placing too great a burden upon the court by requiring it to perform duties and determine facts from the evidence which the defendant had the right to have submitted to the jury. The jury are to say what facts are proved and what are the proper inferences to be drawn from those facts, and in view of the evidence and nature of the conflict at the time the shot was fired, they had a right to conclude, if so convinced by the evidence, that the defendant killed Shada upon a sudden quarrel.

(b) But defendant's main contention is that there was no evidence which would warrant the jury in convicting the defendant of involuntary manslaughter, that is, of shooting the deceased unintentionally while in the commission of an unlawful act. That the defendant was in the commission of an unlawful act at the time of the shooting is proved beyond question. The testimony of witnesses for the defendant is practically unanimous that the crowd was formed for the purpose of going out to the Shada farm, six miles distant, for the purpose of fighting and "licking" the Syrians. In pursuance of their unlawful intention they stopped on the highway three automobiles loaded with Syrians, assaulted and abused them; and within a short distance of the Shada farm stopped their cars, got out and began gathering sticks and weapons of all sorts for purposes of attack. That this was an unlawful assembly is beyond question. It was a mob and a riot in which the evidence seems to point to the defendant as a ring-leader. It needs no argument to show that at the time of the shooting the defendant was in the commission of an unlawful act within the meaning of those words as used in the statute defining manslaughter. But counsel insists that to convict under this alternative the killing must have been unintentional. Here again he seeks to put upon the trial court the burden of determining as a matter of law what

was the intention of defendant when he fired the shot while in the commission of an unlawful act. The intention with which an act is done is one of the most difficult questions of fact which is ever submitted to a court or jury. Neither can enter the mind of the actor and select from the innumerable thoughts and motives which control conduct the one which actuated him in doing a certain thing. So difficult is it to determine the intent that in many instances the law has declared presumptions thereof to aid in the discovery of the truth. In the final analysis the intention of a party must be discovered by the drawing of proper inferences from his conduct. This is the province of the jury, aided, in some cases, by legal presumptions. The evidence tends to prove that defendant pointed his gun at the deceased and fired. This is the testimony of Charles Shada who stood at one angle of a triangle formed by himself, John Shada, and defendant. He says he was about 20 feet east of defendant, who stood from 8 to 15 feet north and a little west of deceased who was standing about the center of the road, which would place him about 20 to 30 feet south and west of the witness. The witness was, therefore, to the side and at an angle from defendant, and though he attempted to do so, was in no position to determine the precise direction in which the revolver was pointed. Counsel in effect argues that the trial court should have accepted the statements of this witness as absolutely and mathematically true, and that, therefore, it is indisputably established that defendant intended to kill John Shada, and that permitting the jury to find an unintentional killing was an error. We cannot accept this proposition. It is not suggested that defendant knew John Shada or had any quarrel with him, nor is any other fact proved which would give rise to an inference that defendant intended to kill the deceased. The only inference is such as may properly arise from the fact that Shada was struck by the bullet from a gun pointed in his direction. We are not prepared to say as a matter of law that other inferences may not be drawn from the circumstances proved. Per-

haps he intended to shoot Gabriel Shada who was closest to him and had just spoken to him, but his aim was poor, or, upon losing the stick, his first weapon, he had pulled out his gun and fired promiscuously at the crowd. The tragedy occurred during a fight, within the space of a very few minutes when all was confusion and clamor. Under these circumstances to substitute the judgment of the court for that of the jury, as to the quality and characteristics of the acts of the parties, would deprive defendant of a substantial right. The inferences to be drawn from the facts and circumstances shown in the evidence are peculiarly within the province of the jury. We have not the slightest doubt that it was the duty of the court to submit to the jury the different degrees of homicide, and that, if he had not, the defendant would now be alleging error in this court for his failure so to do. Having concluded that no error was committed in submitting the question of manslaughter, it will not be necessary to discuss the question of the prejudicial character of such error had it been made.

3. The third assignment of error presents for consideration the exclusion of evidence of a statement of one of the Kearney boys about the time of the shooting. The witness by whom such statement was sought to be proved testified that immediately after the shots were fired some 12 or 15 Kearney boys came running west down the road and met the witness between 100 and 125 feet from the line of boys across the road, and that some boy made an outcry. Witness was then asked what he said: The state objected, and the objection was sustained, as not part of the *res gestæ* and hearsay. Defendant then offered to show by this witness that as the boys were running back some boy called out, "The Dagoes shot." Whether or not a declaration made by one of the participants in a transaction is a part of the *res gestæ* is dependent upon the circumstances of each case. The rule was stated in *Pledger v. Chicago, B. & Q. R. Co.*, 69 Neb., 456, as follows:

"A declaration to be competent evidence, as part of the *res gestæ*, must be made at such time, and under such cir-

cumstances, as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made."

In the same case it is held: "The admission or exclusion of such evidence rests largely in the discretion of the trial court, such discretion is not an absolute discretion to be exercised arbitrarily, but a legal discretion, the abuse of which constitutes reversible error."

It may be conceded that the evidence offered comes within the rule above stated and its admission would not have been error of which the state could complain, but whether its rejection was reversible error as to the defendant depends upon several other matters now to be noticed. The *res gestæ* was the shooting of deceased by some person whose identity was sought. The spoken words are so indefinite that their meaning cannot be ascertained. They may have been intended to convey the information that "The Dago's shot" (the Dago is shot), or that "the Dagoes shot" (the Dagoes fired). The first is the most natural conclusion, as to convey the other meaning the cry would ordinarily have been "The Dagoes are firing," or "shooting." If the former, it referred to a fact about which there was no dispute; if the latter, it merely tended to corroborate the testimony of several of defendant's witnesses that the "Dagoes" fired two or three shots in the air. There is not the slightest basis in the evidence for a claim that John Shada was killed or hit by any of the shots fired from the east. This was physically impossible from the location of the wound and the undisputed evidence of the location of the parties when the shots were fired. The evidence is overwhelmingly convincing that John was in the road facing south and that the fatal shot came from the north and west striking him behind the right ear. All the evidence as to shots coming from the east place the point of firing back and to the left of John and on the south side of the road, and all but two witnesses testified that they were fired in the air or over the heads of the Kearney boys, and the two that the gun was held straight

out. No witness claims that these shots hit any one; some of them only saw the second and third shot fired. It is a fair inference from all the evidence that these shots, if they came from the east, were after a slight pause, and after the shot that killed John. Under these circumstances, and assuming that the evidence was within the *res gestæ* rule, we are unwilling to hold that the trial judge abused his discretion by rejecting the offer.

4. This assigns error in permitting witness Yanney to testify to statements made by Ernest Noble after the first fight in the afternoon. This evidence was brought out on redirect, in response to a suggestion of defendant's counsel on cross-examination that Noble had been kept captive by the Syrians. It seems Noble had been left behind when his comrades left for town after being defeated in the fight, and the statements were to the effect that he and his crowd had been in the wrong. He was allowed to clean up and one of Gabriel's boys took him back to town. The whole description of this first fight was probably immaterial, but the evidence objected to was called out to meet the suggestion that Noble had been kept a captive. We find no error in its reception.

(4) 7, 8, 9. These assignments relate to alleged error on account of remarks of the trial judge during the trial. The witnesses for the state were nearly all Syrians, some of whom did not appear to understand English very well, and there was some discussion as to the need of calling an interpreter. It would needlessly extend this opinion to quote all the questions and answers, but the remarks of the court to which objection is made are as follows: A witness, Mrs. Simon, having been asked by the court, "Do you understand?" answered, "I don't know." And the court said: "You have to understand before you answer." Again, the same witness was asked, "How close did they get to the car?" And the state's attorney said, "Now, you know she don't understand that." And the court: "Well, I tell you gentlemen, I will appoint somebody as interpreter here pretty quick. I am going to know wheth-

er this witness knows what she is testifying about." Mr. Hamer for defendant: "Well, I don't think there is an interpreter here from whom you can get what she—" The court: "Well, I think there are plenty of good honest men around here who will interpret it honestly." Mr. Hamer: "Well, I don't think so." The witness: "Mister, please—" The court: "Hold on. I will give you a chance, but I don't want her misled here." Mr. Hamer: "I don't want to mislead her. That is just what I am trying not to do. I don't want the court to get the idea that I am trying to mislead, nor that suggestion made here, for I am not." The court: "No, I don't think you are, but I am afraid we get her to answer things that she don't understand and then where are we? I am afraid she don't understand the language. Now, we will try it again and see." Later in the trial when Mary Shada was called as a witness, the county attorney said: "Judge, this lady doesn't understand English very well. We will do the best we can with her." The court: "If you want an interpreter, I will appoint one. It was very unsatisfactory with the other witness we examined here the other day. I am very much in doubt as to how much she understood about it." An interpreter was called and the court remarked: "You can go on here with your simple questions for a little while without the interpreter. Of course, counsel understand that, on cross-examination of a person who don't understand the language, you can get them all balled up and it is better to have an interpreter."

It is argued by defendant's counsel that the remarks of the court were "equivalent to saying that the contradictions between the testimony of the witness, Mrs. Simon, and her daughter, Mrs. Miller, could be accounted for on the theory that she hadn't understood the language." When this witness was first called the county attorney suggested that they would need an interpreter, but was instructed by the court to make his questions simple. A perusal of the examination of this witness convinces us that there was a real question as to the need of an interpreter. The

remark of the court was a part of the discussion of that question. We think it will not bear the construction put upon it by defendant's counsel.

Counsel contends that the remark of the court to the effect that an honest interpreter could be had was "a damaging indorsement of the Syrian witnesses," but we do not so consider it. The discussion regarded an interpreter. Probably a Syrian would have to be selected, but not necessarily so. At any rate, to characterize this remark as a comment upon the credibility of witnesses in the case would be giving it a significance not warranted by the words themselves nor the circumstances under which they were uttered.

The remark of the judge that he did not want the witness misled was evidently misunderstood by counsel, and perhaps might have been by the jury; but in his next utterance the judge said he did not believe counsel were trying to mislead her, thus correcting any erroneous impression the jury may have received.

It is suggested that certain statements of the court "show the desire of the court to keep the rude acts done by the boys constantly before the jury to the obscuring of the real issue in the case, or else to convey to the jury the thought that because of these acts the boys were unworthy of credit on the main issue." This proposition is absolutely without foundation in the record, upon a most painstaking examination of which we are unable to find any evidence of bias or partiality on the part of the court. Upon the record we are convinced that defendant had a fair trial. It has been suggested in argument that if any prejudice existed in the community it would be in favor of defendant belonging to a well and favorably known family as against the Syrians. We would be loath to recognize any such condition as would endanger the liberty of a citizen or punishment for crime, but in the present case its nonexistence is manifest by the verdict of the jury.

We have discussed all of the matters argued in the briefs as ground for reversal, and have considered all other as-

signments of error presented upon the oral argument, and have discovered no prejudicial error warranting our interference with the judgment.

AFFIRMED.

ROY H. DENNIS ET AL., APPELLEES, V. CHARLES H. SLAMA, EXECUTOR, APPELLANT.

FILED NOVEMBER 23, 1928. No. 26177.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Slama & Donato and *Votava & McGroarty,* for appellant.

E. D. O'Sullivan, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

PER CURIAM.

The appellees, hereinafter called plaintiffs, instituted this action in the district court for Douglas county against Nels F. Peterson, who afterwards died and the action was revived in the name of the appellant, hereafter designated as defendant, to recover $842.94, the purchase price of certain cattle; and at the same time plaintiffs filed the necessary affidavit to procure the issuance of a writ of attachment and garnishment, alleging as grounds therefor that such Peterson, the then defendant, fraudulently contracted the debt in suit. The writ was issued and Denny commission company, who was indebted to defendant in the sum of about $1,000, was served as garnishee. Defendant did not plead to the petition, but filed a motion to dissolve the attachment and garnishment on the grounds, in substance, that the facts set forth in plaintiff's affidavit of attachment were untrue, and that the debt was not fraudulently contracted. After evidence was introduced on the issues thus presented, both as to the debt and the

affidavit for attachment, the court found on each thereof in favor of the plaintiffs, overruled the motion to dissolve the attachment and garnishment, ordered the garnishee to pay into court $854.34, and entered judgment accordingly. To the overruling of such motion to dissolve the attachment and garnishment defendant appeals, and challenges such judgment on the sole ground that it is contrary to the evidence and the weight thereof.

An examination of the record discloses proof warranting the conclusions reached by the trial court. While we might have found differently if we had been the original triers of fact, it must be remembered that, where a law case is submitted to the court, the same rule is applicable to its findings of fact that would be applicable if such determination had been arrived at by a jury, to wit, that such judgment or verdict will not be disturbed on appeal unless the same is without support in the evidence.

Therefore, as we have seen that the findings and judgment of the trial court were not without supporting evidence, its determination should be, and is, in all things

AFFIRMED.

MARY LANNING MEMORIAL HOSPITAL ASSOCIATION, APPELLEE, V. ADAMS COUNTY, APPELLANT.

FILED NOVEMBER 23, 1928. No. 26196.

APPEAL from the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Affirmed.*

Walter M. Crow, for appellant.

Herman G. Schroeder and *Stiner & Boslaugh, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

PER CURIAM.

Affirmed on authority of *St. Elizabeth Hospital v. Lancaster County*, 109 Neb. 104, *House of the Good Shepherd*

v. Board of Equalization, 113 Neb. 489, and *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106.

AFFIRMED.

THOMAS L. HALL, APPELLANT, V. EMERSON L. BOWERS ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 26171.

1. **Appeal in Equity:** MOTION FOR NEW TRIAL. "In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." *Farmers Loan & Trust Co. v. Joseph,* 86 Neb. 256.
2. **Eminent Domain:** RAILROAD RIGHT OF WAY: GRANT OF USE. Where lands have been legally condemned and appropriated for railroad right of way through a farm, the use of a strip of that right of way, granted by written license from the railroad company to one of its patrons for his convenience in driving live stock to the railroad station for shipment and terminable on short written notice, will not be enjoined at the instance of the adjoining owner who is the owner of the fee in the right of way, in the absence of special or irreparable damage to such owner.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Burkett, Wilson, Brown & Wilson, for appellant.

Kennedy, Holland, De Lacy & McLaughlin, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

GOSS, C. J.

This suit was brought to enjoin defendant from using the right of way of the railroad company for the purpose of driving live stock toward a local station for shipment to market. From a decree adjudging that Emerson L. Bowers, the chief defendant, might use a lane on the right of way created under a license from the railroad company the plaintiff appeals.

Emerson L. Bowers (who will be referred to as defendant unless it becomes necessary to distinguish him from other defendants) and Thomas L. Hall own and occupy farms north of the village of Verdon, both located in the west half of a certain section. The Hall farm is directly south of the Bowers farm and therefore is nearer to the railroad station at Verdon, which is their normal shipping point. The railroad runs in a southeasterly direction through both farms toward Verdon. The right of way is held by the railroad company by virtue of condemnation proceedings. On the easterly side of the right of way Mr. Hall has on his farm a private road 23 feet wide running southward from his improvements to the east and west public highway on the south of his farm. From this public highway there is a public highway south toward Verdon and adjacent to the east side of the right of way. The evidence does not show how far Verdon is from the east and west highway, but it is not far. Previously the defendant had to drive his stock for shipment north of his home and around by the public road, additional distance, of about two miles, to Verdon, but some time prior to the commencement of the suit he had been driving them down the right of way to the aforesaid east and west public highway and thence to Verdon along the said public highway adjacent to the right of way. He testified that it saved him $40 to $50 a car to use this shorter route to drive his hogs to Verdon for shipment as compared with hauling them by truck, which was necessary when taking the longer route, because it is too far and there are too many bridges on the road; and that during the prior year he had had a total of 141 cars of all kinds for all his farms in and out of Verdon on the Missouri Pacific. Plaintiff had two private way crossings of the railroad near his improvements in the northern part of his farm for the use of that part of his farm west of the railroad.

The petition was filed March 4, 1926, and we assume that is the date of the commencement of the suit. At that time defendant had no license from the railroad company to use

its right of way for the purposes complained of; and for some time he had been driving his stock through a fence on his south line and thence down the right of way and on plaintiff's private road, which was not then fenced against the right of way. Such was the situation until after the suit was commenced.

The evidence shows that under date of April 10, 1928, defendant and the Missouri Pacific Railroad Corporation in Nebraska, which owned the railroad in question, entered into a written agreement, called a "License to occupy railroad right of way." This license covered a strip of the right of way 28½ feet wide along the east side thereof and next to the private road of plaintiff. It extended from the east and west highway in a northeasterly direction about 2,870 feet to defendant's land. It provided for a fence along the boundary of the strip nearest the railroad track and for gates to be constructed across the strip where it intersected the private crossings of plaintiff. The license was not to be operative until the fence and gates should be constructed and installed and it provided for other things not necessary to state here. The gates and fence were not yet constructed, but a fence had been erected on the right of way line between the railroad and the Hall private road before the time of trial.

The district court found that, at the commencement of the action, the defendant Emerson L. Bowers had, without lawful right, been using the railroad right of way where it crossed plaintiff's lands for the purpose of driving live stock to the station at Verdon, that at such times they had trespassed on plaintiff's lands and private driveway and that, at the commencement of the action, plaintiff was entitled to an injunction restraining said defendant from using the right of way and from said trespasses on said land; that, after the action was begun, the railroad company had granted said defendant the license to drive his live stock through the lane made by the boundary line fence of the right of way and by the fence between that and the railroad track; and that said license was valid

as between plaintiff and defendant. The court decreed that the defendant might use the land described only as permitted by the license.

The questions raised on appeal are questions of law. Appellant's first assignment alleges that the court erred in receiving the license in evidence under the answer, which consisted of a general denial. The petition alleged that the defendant trespassed on plaintiff's private way without the consent of plaintiff, drove his live stock along both the right of way of the railroad company and the private way of plaintiff with no fence to separate said ways; that the driving of cattle and hogs over the right of way of the railroad was no part of the railroad business; that the condemnation proceedings by which the right of way was acquired gave the railroad company no authority to drive live stock over the right of way or to permit the same to be done by the defendant; and that the said acts of the defendant were done by him without right or authority and without any permission or grant of leave by the plaintiff. The general denial raised an issue on all the material facts alleged. Plaintiff was therefore required to prove in these respects that the defendant had no permission (1) from the plaintiff to trespass on his land and (2) had no authority from the railroad company to drive his stock along the right of way. Of course, plaintiff had in reserve as a matter of law the lack of legal right of the defendant to use the right of way even if granted such authority by the railroad as it might have. It is to be noted that, when the license was offered in evidence, the plaintiff did not object to its admission on the ground that it was not pleaded in the answer, but merely objected to it "as incompetent and immaterial under the issues." This did not fairly bring to the notice of the trial court the objection that he argues here. If he had objected to the license on the ground that it was not pleaded, the court might have allowed the answer to be amended on such terms as might be just. Moreover, the transcript does not show that any motion for a new trial was filed. In *Farm-*

ers Loan & Trust Co. v. Joseph, 86 Neb. 256, we held: "In an equity case appealed to this court, if it is desired to review alleged erroneous rulings of the trial court as to the reception of evidence, a motion for a new trial must be filed and overruled in the district court." That is the settled rule both in actions at law as well as in suits in equity. *State v. Citizens State Bank,* 115 Neb. 271, and cases cited therein. We think there was no error in the ruling of the court and, if the ruling was erroneous, it has not been properly challenged and preserved.

The other assignments of error attack the right of the railroad company to use the right of way or to allow it to be used by another even for the limited purpose of driving the live stock of the defendant through the land toward the station for shipment, or from the station to his home.

It was stipulated on the trial that the railroad company has no title to the real estate except such as was obtained by its predecessor, which condemned the right of way across the land now owned by plaintiff; and that the plaintiff is the owner of the fee, subject only to the rights of the railroad company obtained under such condemnation proceedings.

The main question for consideration is whether the proposed use of the right of way was reasonably to be contemplated when the right of way was transferred to the railroad company. Questions somewhat analogous to that involved here have arisen in a multitude of cases, too numerous even to cite. It has been held, when the business is conducted by the railroad or by its patrons in such a way as to further the business of the railroad, the right of way may be used for elevators, lumber yards, coal yards and sheds, for wharves, docks and piers, for warehouses and corn cribs, for storage purposes, for stock-yards and pens, for refreshment and recreation places, for hotels and boarding houses, and for telegraph and telephone poles, for cultivation of portions of the right of way by third persons, and for uses for many other miscellaneous purposes. In an extensive note on the uses to which railroad right of

way may be devoted as against the owner of the fee, found in 36 L. R. A. n. s. 512, the author well sums up the general principles in these words: "The general rule seems to be that any use of the right of way, or any structure upon it that tends to the convenience or benefit of the railway company or of its patrons, and that does not interfere with the business of the company or its duty to the public, and that does not cause special or irreparable damage to the fee owner, will be permitted, even against the objection of the fee owner."

The testimony in this case shows that the use of the right of way was induced by an arrangement between defendant and the railroad company that he should give the railroad company all business arising out of live stock shipped by him and driven over the right of way. By the terms of the written license either party may terminate it on 30 days' written notice served on the other.

This arrangement served the purposes of both parties to it. It saves the licensee a long drive of his fat cattle and hogs to the station for shipment and such incidents in the way of time and shrinkage as would flow therefrom. As long as the license continues it insures tonnage of live stock to the railroad through this advantage over its competitor in the same town.

We are of the opinion that the general rule heretofore quoted is peculiarly applicable to this case. Is there any great and irreparable injury likely to result to the appellant? When he brought the suit the license to use the right of way was not in existence and, as the evidence shows, the almost inevitable result of driving cattle down the right of way was to cause a trespass on his private driveway if not upon his farm lands. At the time of the trial his main objection was removed by the fact that the right of way had by that time been fenced off from his driveway. If it had not been for the injunction the lane contemplated by the license would probably have been fenced. Before the license can be operative by its terms, it must be fenced. When that is done the appellant's causes of complaint will

be limited to the use by defendant of the right of way over appellant's two railroad crossings between the east and west sides of his farm. The license from the railroad, in precise terms, requires the licensee to put "the necessary gates therein at all places where said strip intersects existing private crossings." The appellant does not have the right to the continuous and exclusive use of these crossings at all times so that he can prevent all other use of that portion of the right of way. The evidence shows that it is the intention of the railroad company and of its licensee that gates shall be so provided that, when the strip or lane is used under the license, swinging gates may close the crossings against the live stock driven down the right of way and the same gates may serve to protect the lane and make an open crossing for appellant after the live stock of the licensee shall have passed the crossing.

Each case of this kind must be bottomed on its own facts. To our minds the appellant has suffered and will suffer no irreparable injury through the use of the right of way as contemplated by the license; the contemplated use of the surface of the right of way does not jeopardize his fee title, is not likely to injure the health of his own live stock, does not impair his use and enjoyment of his contiguous lands and does not entitle him to injunctive relief under the facts shown.

We are of the opinion that, where lands have been legally condemned and appropriated for railroad right of way through a farm, the use of a strip of that right of way, granted by written license from the railroad company to one of its patrons for his convenience in driving live stock to the railroad station for shipment and terminable on short written notice, will not be enjoined at the instance of the adjoining owner who is the owner of the fee in the right of way, in the absence of special or irreparable damage to such owner.

The decree of the district court was right and it is

AFFIRMED.

Heard on motion for rehearing April 25, 1929, before GOSS, C. J., DEAN, GOOD, THOMPSON, EBERLY and DAY, JJ., and REDICK and SHEPHERD, District Judges. *Motion overruled. Former opinion adhered to.*

SHEPHERD, District Judge, dissenting.

Because of the following, I dissent from the majority opinion.

Shippers and feeders commonly handle more or less diseased stock, not of intention, but because it cannot be avoided—stock infected with cholera, tuberculosis and other communicable diseases. One hundred and fifty carloads a year through a narrow runway on a man's farm expose him to no small risk through danger of infection to his own stock. Cattle, horses and hogs go eagerly to smell and to lick the fencing along such a runway. The runway in question permits the lessee, not only to drive away upon it for shipment by the Missouri Pacific, but to bring in by it for feeding from 100 points accessible by the county highways. Is Hall's injury in this particular reparable because he may sue Bowers at law when his cattle fall sick from such a cause? And must he incur the hazards of proof in a law action time after time as loss occurs, when the danger is at all times obvious and when he might have complete relief by a single suit in equity? The very question suggests a negative answer. Used as it is, this runway decreases the salable value of plaintiff's place by many hundreds of dollars, though no doubt such a use was never thought of when the land was condemned. In addition to this, he has been postponed in his prior acquired right of crossing to the present privilege now granted to the defendant—in his access from one part of his farm to another, given him long before by the company. It seems to the writer that it is being blind to the evidence and to patent conditions to dismiss Hall's damage with the statement that it is neither special nor irreparable. Hitherto it has been widely accepted as elementary that what is improper and illegal, except in certain cases of special and peculiar character, may be restrained without reference

to the degree of injury involved. The plaintiff may have a penchant for disagreement with his friends and neighbors, though this appears rather by statement of counsel than by the record; but, even so, he should not be stripped of his legal rights as he stands before the court.

With due regard for the views of the majority, the pronouncement that the railroad company may use its right of way in any manner beneficial to it or to its patrons is much too strong. It not only extends the power of railroad companies over their right of way far beyond the bounds heretofore established by our decisions, but it creates in substance a new estate almost as desirable as an estate in fee simple. Under and by virtue of power derived from condemnation, as recognized by the opinion, a railroad might construct a speedway for motor vehicles upon its right of way, or for a valuable consideration commit the right to do so to third parties. And hardly could it be enjoined if a nuisance were there maintained in that connection. The point is, we are abandoning the old ground that railroads may condemn and use their right of way only for such things as are naturally incident to operating a railroad, and going to a doctrine which has little support in logic and which promises many difficulties.

I think that the power which the company assumed to exercise in giving Bowers a right to build a private cattle road upon Hall's farm was a power which it did not possess. As before stated, nothing of the kind was contemplated on original condemnation or considered in the award of damages. Yet, from the simple easement acquired for railroad purposes, the company proceeded to carve out and convey a leasehold estate, *i. e.*, to grant Bowers this private way for his stock over his neighbor's land. If power to do a thing of this kind is within the powers of railroads generally, why should they be troubling themselves in these latter days to get deeds to ground long ago condemned by them for right of way?

Perhaps giving Bowers a privilege so valuable (he tes-

tifies that it is worth $5,000 year to him) was not strictly a rebate, but it was a buying of his shipping business, and practically tantamount thereto. It was, in the opinion of the writer, an undue and unreasonable preference such as the law prohibits. Comp. St. 1922, sec. 5510; sections 5440 and 5509 of said statutes, as amended by chapter 160, Laws of 1923, and chapter 164, Laws 1925. "Under the law in this state, a railroad company or other common carrier may not exchange transportation for services or property by way of barter, uniformity of charge being required." *State v. Union P. R. Co.*, 87 Neb. 29. This transaction between the Missouri Pacific and Bowers was a barter by which in effect the latter secured a reduction in his shipping charges. This court stated in *State v. Chicago, B. & Q. R. Co.*, 112 Neb. 248, that at common law a carrier of goods or passengers was under no obligation to treat all persons equally, but might grant one individual an unreasonably low rate or even carry for him without making any charge whatever. But it concluded in said case, in view of section 7, art. X of the Constitution, providing that the legislature shall pass laws to correct abuses and prevent unjust discrimination by telegraph and railroad companies in Nebraska, that such power on the part of common carriers has been taken away. The case will be remembered as the suit brought to prohibit railroads from giving transportation to ministers. The favor granted to Bowers should not receive the sanction of the court.

The opinion, I am quite sure, does some violence to fundamental rules of pleadings. As clearly presented in the argument of plaintiff, the general denial filed by the defendant was not sufficient to entitle him to show the lease which he obtained from the company after the commencement of the case at bar. If he desired to defend upon this lease—and without it he would have been without any defense whatever—it was incumbent upon him to plead it, just as the maker of a note is required to plead payment if he would avail himself of that defense in a suit upon

said note. And the objection of "incompetent" to the offer of said lease upon trial was enough to exclude it, unless we go upon the subversive theory that the one at fault is to have more tender consideration at the hands of the court than the one who is without blame. So far from requiring the party to particularize his objection, it would seem more reasonable to oblige the trial court to inquire as to the specific end to be reached by the general objection of "incompetent" before the objector is to be deprived of any exception which he is entitled to under the broadest meaning of the term. The matter is of much importance to the plaintiff in this case, but it is of far greater importance in its effect upon rules of constant application.

For these reasons, I consider the majority opinion unsound, and think that the decision should be in favor of the appellant, and that he should be awarded the relief prayed.

THOMPSON and EBERLY, JJ., dissenting.

While we join in the conclusions reached by Shepherd, District Judge, in his dissent, it might be well to further suggest that this court should take judicial notice that the Missouri Pacific Railroad (involved herein) is one engaged in interstate commerce, and hence the federal laws, as well as those of our state, must have consideration and be permitted to function in determining the question of illegal discrimination. Such federal laws have been construed in the following cases: *United States v. Vacuum Oil Co.*, 153 Fed. 598; *Hocking Valley R. Co. v. United States*, 210 Fed. 735; *Spencer Kellogg & Sons v. United States*, 20 Fed. (2d) 459; *Armour Packing Co. v. United States*, 207 U. S. 590; *United States v. P. Koenig Coal Co.*, 270 U. S. 512.

Thus considered, it necessarily follows that syllabus No. 2 of the majority opinion is erroneous, as is the affirmance of the trial court's judgment.

IN RE ESTATE OF JAMES KERR.
DAVID ARMSTRONG, APPELLANT, V. MARGARET WALL ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 25953.

1. Wills: APPEAL: TRIAL DE NOVO. A defeated litigant in the contest of a will is not entitled to a trial *de novo* on appeal to the supreme court.
2. ———: ———: ISSUES OF FACT. On appeal to the supreme court from a judgment in the contest of a will, issues of fact are determined by the sufficiency of the evidence to sustain the verdict of the jury or the findings of the district court.
3. ———: MENTAL CAPACITY: QUESTION FOR JURY. Where evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury.
4. ———: ———: PROOF. In resisting the probate of a will, contestants, under an allegation that testator did not have mental or testamentary capacity to make it and was not of sound mind, may introduce evidence tending to prove that he had insane delusions with respect to ignored kindred who would inherit his property in absence of a will and that he was thus controlled and rendered insensible to the ties of blood and kindred.
5. ———: ———. "Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred." *McClary v. Stull*, 44 Neb. 175.
6. Trial: SPECIAL FINDINGS: JUDGMENT. "To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion." *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330.
7. Wills: CONTEST: INSTRUCTIONS. Instructions referring to kindred who would inherit the property of testator in absence of a will, as "the natural objects of his bounty," and stating that "a man is under certain moral obligations" to them, *held* not prejudicially erroneous, where the jury were directed that the one principal question for consideration was his competency to make a will and that, notwithstanding the ties of blood and kindred and such obligations, he had a right to leave his prop-

erty to whomsoever he pleased, if possessing testamentary capacity.

8. ———: ———: PROVINCE OF JURY. In the contest of a will, the jury, if they find unnatural and unreasonable provisions therein, may be permitted to consider them in connection with evidence of testator's mental incompetency, when instructed to sustain the will if they find that testator was competent to make it.

APPEAL from the district court for HOWARD COUNTY: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

T. T. Bell, Prince & Prince and *Haggart & Haggart,* for appellant.

Taylor & Spikes, Charles W. Dobry, and *Hall, Cline & Williams, contra.*

Heard before GOSS, C. J., ROSE, GOOD and EBERLY, JJ., and REDICK, District Judge.

ROSE, J.

This is a proceeding to probate a written instrument as the will of James Kerr, a bachelor residing in Howard county. The instrument offered for probate was in legal form a will. It was dated December 26, 1923, was signed by James Kerr as testator and was witnessed by two persons. It purported to leave real estate and personal property exceeding in value $40,000 to David Armstrong, a cousin of testator, without mentioning nearer relatives. Kerr died February 18, 1926, at the age of 67 years. Armstrong was nominated in the will as executor. As proponent he offered the will for probate in the county court of Howard county, where it was assailed by a brother of testator, by four sisters and by children of three deceased sisters, all of them contestants on the ground, among others, that Kerr was mentally incapacitated at the time from making a valid will. The county court admitted the will to probate and contestants appealed to the district court. At the close of a protracted trial there, the jury rendered a general verdict in favor of contestants, finding that the

instrument offered for probate was not a valid will. From a judgment on the verdict proponent appealed to the supreme court.

The sufficiency of the evidence to sustain a finding that testator did not have mental capacity to make a will December 26, 1923, was challenged by motion for a peremptory instruction in favor of proponent and by a motion for a judgment probating the will notwithstanding the general verdict. The question raised by those motions was vigorously presented on appeal and required examination of a record containing over 1,000 pages of typewritten matter. On review in the supreme court this issue of fact is not to be determined by a preponderance of the evidence. Here the case is not for trial *de novo*. The question for determination is the sufficiency of the evidence to sustain the general verdict of the jury. *In re Estate of O'Connor*, p. 636, *post*. Owng to the great volume of testimony admitted during the trial in the district court, an analysis of the evidence in an opinion is deemed to be impracticable. Evidence relating to mental capacity was conflicting and presented a question for the jury. Incidents and circumstances detailed by witnesses and opinions expressed by them were sufficient to sustain a general finding that James Kerr, when he signed the instrument offered for probate, was controlled by insane delusions with respect to his brother and sisters. The evidence was also sufficient to warrant the inference that hostility toward them was without justification in reason. These deductions inhere in the general verdict that the instrument offered for probate was not the valid will of decedent. Upon consideration of the case from every standpoint the conclusion is unanimous that the verdict should not be set aside on the ground that it is not supported by sufficient evidence.

Several assignments of error were directed to special interrogations, to answers of the jury and to rulings in relation to those subjects. Interrogatories requested by proponent and submitted to the jury follow: (1) "Did the

deceased, James Kerr, at the time he signed the instrument tendered in evidence as his last will and testament, understand the nature of the instrument which he was signing?" (2) "Did the deceased, James Kerr, at the time of signing said instrument, comprehend generally the nature and extent of the property which constituted his estate?" (3) "Did the deceased, James Kerr, at that time know his relatives and did he know whom he desired to make the object of his bounty?" To each of these the jury answered "Yes."

Contestants requested and the court gave two additional interrogations in the following form: (4) "Was James Kerr, at the time of the execution of the purported will, of sound mind?" (5) "If James Kerr knew what property he had and who the natural objects of his bounty were, at the time of the execution of the purported will, was he at such time laboring under any insane delusions regarding the natural objects of his bounty, which rendered him insensible to the ties of blood and kindred and which controlled or influenced him in the execution of said purported will?" To the first of these the jury answered "No" and to the second "Yes."

The fourth and fifth interrogatories were submitted and answered without objection. Thereafter proponent assailed the fourth interrogatory by motion to set it aside on the ground that it was incompetent, irrelevant and immaterial and not supported by the evidence. The fifth was likewise assailed, including the additional ground that it was not within the issues. The motions attack also the special findings of the jury in answering those questions. Taking the position that questions four and five and the answers thereto should have been stricken out, proponent moved for judgment in his favor on the first, second and third special findings notwithstanding the general verdict. Conceding for the purposes of a decision that the proper method was pursued in the attempt to eliminate the fourth and fifth questions and the answers thereto, but not ruling on that point, it seems clear that the position taken

by proponent is untenable. In the answer of contestants to proponent's petition for the probating of the will it was alleged:

"At the time of the execution of said instrument offered for probate, the said James Kerr did not have mental ability and testamentary capacity to execute a will and was not of sound mind and memory."

Contestants adduced testimony tending to prove that testator, with respect to relatives who would inherit his property in absence of a will, had insane delusions that rendered him insensible to the ties of blood and kindred and that controlled him in making the instrument offered for probate. This testimony was within the issues. A person who may make a will is described by statute as follows:

"Every person of full age and sound mind, being seised in his own right of any lands, or any right thereto, or entitled to any interest therein, descendable to his heirs, may devise and dispose of the same by his last will and testament in writing." Comp. St. 1922, sec. 1241.

A "sound mind" is essential to testamentary capacity. A principle applying to that term has been stated in this form:

"Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred." *McClary v. Stull,* 44 Neb. 175.

This principle applies to the issue of insane delusions respecting relatives who would inherit decedent's property in absence of a will. *In re Estate of Ayer,* 114 Neb. 849. That issue was not determined by the ultimate facts found by the jury in their answers to questions one, two and three. It follows, therefore, that proponent would not have been entitled to a judgment on the special findings in his favor notwithstanding the general verdict, even if interrogatories four and five had not been submitted or

had been stricken out. The following has long been a rule of the supreme court:

"To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion." *Omaha Life Ass'n v. Kettenbach,* 55 Neb. 330. See, also, *Kafka v. Union Stock Yards Co.,* 78 Neb. 140; *Crabtree v. Missouri P. R. Co.,* 86 Neb. 33.

Findings one, two and three omit an ultimate, issuable, evidential fact essential to the legal conclusion that proponent is entitled to a judgment in his favor notwithstanding the general verdict against him. The assignments of error directed to the rulings that apply to the general and special verdicts of the jury are overruled.

Proponent criticises as erroneous and prejudicial instructions referring to kindred who would inherit the property of testator in absence of a will, as "the natural objects of his bounty," and stating that "a man is under certain moral obligations" to them. In the making of a will the mental capacity of a testator to recognize kindred who would inherit his property in absence of a will may be material. *Carter v. Gahagan,* 102 Neb. 404; *In re Estate of Wilson,* 78 Neb. 758; *In re Estate of Nelson,* 75 Neb. 298. Detached expressions in the instructions, however, were open to criticism and should not have been used under the circumstances disclosed by the record, but they were not prejudicial to proponent when viewed in the light of the entire charge which confined the jury to mental capacity of testator as the controlling issue. The jury were directed that the one principal question for consideration was the competency of testator to make a will and that, notwithstanding the ties of blood and kindred and his obligations to them, he had a right to leave his property to whomsoever he pleased, if possessing testamentary capacity. The rights of proponent were protected by the trial court. The jury were not misled.

There is also criticism of an instruction containing lan-

guage to the effect that, if the jury find from the evidence that testator, in leaving his property to his cousin rather than to his legal heirs, acted in an unreasonable, unjust and unnatural manner, that fact may be considered as bearing upon the condition of his mind at the time the will was made. "That fact," if so found by the jury, was, according to the entire charge, for consideration in connection with all other evidence in the case. The jury were directed to find for proponent notwithstanding unreasonable, unjust and unnatural terms of the will, if Kerr had testamentary capacity to make it. Undue prominence was not given to that feature of the evidence. It was without probative effect in absence of evidence showing want of testamentary capacity. As limited by the instructions the trial court did not err in permitting the jury to consider it. *In re Estate of Gunderman*, 102 Neb. 590; Schouler, Wills (6th ed.) sec. 212.

Prejudicial error in the proceedings has not been found and the judgment on the general verdict is

AFFIRMED.

IN RE ESTATE OF JOHN O'CONNOR.
ELIZABETH O'CONNOR BURGOYNE ET AL., CLAIMANTS, APPELLANTS: CHARLES M. O'CONNOR ET AL., CLAIMANTS, APPELLEES, V. STATE OF NEBRASKA, INTERVENER, APPELLEE.
CHARLES M. O'CONNOR ET AL., CLAIMANTS, APPELLANTS, V. STATE OF NEBRASKA, INTERVENER, APPELLEE.
ANNA BEEBE ET AL., CLAIMANTS, APPELLANTS, V. JOHN SLAKER, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.
ANNA BEEBE ET AL., CLAIMANTS, APPELLANTS, V. JOHN SLAKER, ADMINISTRATOR DE BONIS NON, ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. NOS. 26457, 26462, 26464, 26731.

1. **Escheat: INTERVENTION BY STATE.** Where, in proceedings to probate the estate of a decedent, numerous persons file petitions

alleging that they are related to decedent, and there is reason to believe that decedent died without heirs and that the asserted claims to such relationship are not well founded, it is proper for the state to intervene and assert its right to the property of the decedent by escheat and prevent the establishment as genuine of a spurious claim.

2. **Appeal.** Prejudicial error cannot be predicated on a ruling or judgment entered by the trial court which does not affect any substantial right of the complaining party.

3. **Descent and Distribution:** ESCHEAT: BURDEN OF PROOF. There is a presumption that every deceased person left surviving some kindred, and the burden is on the state to prove the failure of kindred or surviving spouse, entitling it to the property of deceased by escheat. There is no presumption of law that any particular person or claimant is an heir of the decedent.

4. ———: BURDEN OF PROOF. Where two or more groups of persons claim to be the next of kin and heirs of a decedent, each group has the burden of establishing its claim by a preponderance of the evidence.

5. **Appeal.** A ruling of the trial court on the rejection or admission of evidence which works no injury to the complaining party is not a ground for reversing a judgment or for awarding a new trial.

6. **Descent and Distribution:** RELATIONSHIP: PROOF. Evidence of general resemblance of one individual to another should not be received for the purpose of establishing consanguineous relationship; but, where specific traits and particular or peculiarly marked physical characteristics are shown to exist, evidence thereof should be received for the purpose of proving such relationship, and the weight and value of such evidence left to the jury.

7. **Trial:** ORDER OF PROOF. It is a general rule that in the trial of an action the party against whom judgment would go if no evidence were introduced shall first introduce evidence and be entitled to open and close the arguments to the jury. This rule is not applicable, however, to a case where there are several parties, and where judgment would go against each of the parties if no evidence were introduced. In such a case, it rests within the sound discretion of the trial court to determine which of the litigants shall first produce evidence and which shall open and close the arguments to the jury; and error on the part of the trial court in this respect can be predicated only by showing an abuse of this discretion.

8. ———: PROCEDURE. In the trial of causes contingencies not infrequently arise where no rule has been prescribed either by legislative action or judicial opinion. In such cases the trial court should adopt a rule that will promote the administration of justice and fairly protect the rights of all the parties litigant.

9. **Jury: HEIRSHIP: QUESTIONS OF FACT.** In the trial of a cause in the district court, where different groups of litigants are seeking to establish that they are heirs at law of decedent, and where questions of fact only are involved, the proceeding is purely legal, and the parties are entitled to a trial of the issues to a jury.

10. **Appeal.** An instruction to the jury that is not prejudicial to the complaining party constitutes no ground for a reversal of the judgment.

11. **Evidence** examined and *held* to support the verdict.

12. **New Trial.** "A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative and would not, in all probability, affect the result if a new trial were granted." *Parkins v. Missouri P. R. Co.*, 79 Neb. 788.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

D. B. Massie and *Ambrose C. Epperson*, for appellants.

Charles E. Bruckman, Richard Price, Allen G. Fisher and *Charles A. Fisher*, for Charles M. O'Connor et al.

Paul E. Boslaugh and *John A. Lawler*, for the State.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

These actions involve the final settlement of, and determination of heirship to, the estate of John O'Connor, deceased, and originated in the county court of Adams county.

O'Connor departed this life August 17, 1913, intestate. So far as disclosed, he was never married and left surviving no parent or issue. His place of birth, age and wheth-

er he left surviving any relatives, who are entitled to inherit his estate, are matters in dispute.

O'Connor had lived in the city of Hastings for a period of about 40 years preceding his death. When he first located in that city he was a cobbler and for several years worked at his trade. Later he became a shoe merchant and about 1908 he retired from the mercantile business and devoted his time and attention to looking after his property interests. He lived frugally and invested his savings prudently. At the time of his death his property was valued at approximately $100,000. During his 40 years' residence in Hastings he was known generally as a bachelor and to be reticent concerning his past life and family history. It is not disclosed that during his residence in Hastings any relative, or person claiming to be a relative, ever visited him. Among his personal effects there was not found any picture or photograph of, or letter purporting to have been written by, any relative.

Soon after the death of O'Connor many persons, claiming the right to succeed to his estate, appeared. Some presented and sought the probate of instruments purporting to be wills executed by O'Connor. Others claimed to be relatives and entitled to inherit his property, if it should be determined that he died intestate. Many of these claims have been heretofore litigated and finally determined adversely to the proponents of purported wills and to those claiming the right to inherit as next of kin. A number of these cases have been brought to and determined by this court. The following reported decisions relate to these matters: *In re Estate of O'Connor,* 101 Neb. 617; *In re Estate of O'Connor,* 105 Neb. 88; *In re Estate of O'Connor,* 114 Neb. 266.

In the present proceedings in the county court there were 12 distinct groups of persons, each group claiming to be relatives of O'Connor and to have the exclusive right to inherit his property. The state of Nebraska intervened as to each of the claimants, alleging that O'Connor had died intestate, without widow or kindred to inherit his

property, and claiming title thereto by escheat. A trial in the county court resulted in a finding in favor of the state and against each group of claimants. Three of these groups appealed from the judgment of the county court to the district court, and the state appeared in that court as intervener, as against the appealing claimants. The several appeals were consolidated and tried as one action to the court and a jury. The verdict was against each group of claimants and for the state, finding that O'Connor had died without leaving a widow or any kindred. Judgment was entered on the verdict. Each group of claimants has perfected a separate appeal to this court, where, for the purposes of argument, the appeals were consolidated and heard at one time. For convenience, the several groups of claimants will be designated and hereinafter referred to as the Burgoyne claimants, the O'Connor claimants, and the Beebe claimants.

After the trial in the district court and at a subsequent term of court, the Beebe claimants filed a second motion for a new trial, based upon the ground of newly discovered evidence. This motion was by the district court overruled, and the Beebe claimants have perfected a second appeal to this court, to review the ruling of the court on the motion for a new trial.

The Burgoyne claimants assert that they are nieces of O'Connor, being daughters of his deceased sister Margaret. They aver that their mother was one of four children, the other three of whom were brothers named John, James E., and Michael; that James E. and Michael predeceased John O'Connor and left no surviving issue; that their grandparents came from County of Clare, Ireland, to St. Alphonse, in Quebec, Canada; that John O'Connor learned the cobbler's trade and left home about 1864, and apparently was not seen again nor heard from directly by any member of the family of these claimants until 1896, when, it is claimed, he visited his sister Margaret, in Washburn, Wisconsin.

The O'Connor claimants aver that they are children

of Michael O'Connor, deceased, and that Michael O'Connor was a brother of John O'Connor; that John and Michael and another brother came from Ireland to the state of Michigan about 1858, and that in 1859 or 1860 John O'Connor left Jackson, Michigan, and went west; that none of this group of claimants or their families ever again saw him in his lifetime.

The Beebe claimants assert that they are descendants of brothers of John O'Connor; that the latter was born in Ballyhoolie, county of Cork, Ireland; that John O'Connor was one of a family of four children; that he came from Ireland to Pennsylvania, from there removed to Ontario, Canada, later going to Dubuque, Iowa, and from there to Nebraska. Each of the several groups of claimants deny the relationship of either of the other groups to John O'Connor, and each group of claimants disclaim any relationship to either of the other groups.

There are numerous assignments of error, a number of which are common to each of the appeals. These will be considered first.

Each of the claimants alleges error in that the trial court permitted the state to intervene and resist the right of any claimant to the estate of John O'Connor. It seems to be the contention of the claimants that, as long as there is any person claiming to be an heir of O'Connor and whose right has not been judicially determined, the state has no right to intervene and has no interest in the estate.

Section 8552, Comp. St. 1922, confers on any person, who has or claims an interest in the matter in litigation in any pending action, the right to become a party to such action. Such intervener may join with either plaintiff or defendant to resist the claims of the other, or, if his interest so requires, he may resist the demands of both. The state was claiming that O'Connor died without leaving heirs or widow, and that it was entitled, under the law, to take the estate left by O'Connor. Each group of claimants were seeking to establish kinship to decedent, and if any of them could establish their claims they were entitled

to the estate. The real question, in its final analysis, was to determine who was entitled to the property of decedent. The state's claim was adverse to each of the other claimants, and it claimed an interest in the subject-matter of the litigation, namely, the property of John O'Connor, deceased.

The right of the state to intervene in such a proceeding is conferred by statute and has been heretofore established by the decisions of this court in the following cases: *In re Estate of Keller,* 101 Neb. 115; *In re Estate of O'Connor,* 114 Neb. 266. In the latter case it was held: "Where, in the county court in the probate of the estate of an intestate decedent, numerous persons file petitions, alleging that they are related to decedent, and there is reason to believe that the decedent died without heirs, it is proper for the state to intervene in the proceedings, and assert its right and prevent the establishment of a spurious claim as genuine." Among the decisions from other jurisdictions, holding to the same effect as those of our own court, are the following: *State v. Lancaster,* 119 Tenn. 638; *In re Estate of McClellan,* 31 S. Dak. 641; *State v. O'Day,* 41 Or. 495. We adhere to the rule adopted in our former cited opinion.

It is contended by each group of claimants that the court erred in entering a judgment for, and awarding the property of O'Connor to, the state. Prejudicial error cannot be predicated on a ruling or judgment of the trial court which does not affect the substantial rights of the complaining party. In the instant case, if the judgment against each group of claimants, adjudging that they are not heirs of O'Connor, is free from prejudicial error, the judgment for the state does not concern them nor affect any of their substantial rights. Whether prejudicial error has been committed in the verdict and judgment against any of the claimants will be determined in the course of this opinion.

Another contention made by two or more of the groups of claimants is that the presumption obtains that every deceased person left heirs, and that the burden is on the

state to prove the failure of kindred or surviving spouse, and it is insisted that this should be by proof of high degree. While the presumption obtains that the deceased person left surviving heirs, it does not follow that there is a presumption that any particular person or claimant is an heir. If such were the case, then, of more than 200 persons, who have appeared, claiming the O'Connor estate, there would be a presumption in favor of each one, although the various sets of claimants, more than a score in number, are unrelated to each other. This presumption would probably obtain as against the right of the state to a judgment of escheat, but, as heretofore pointed out, unless there was error in the trial, relating to one or more of the groups of claimants, wherein the jury found that they were not related to O'Connor, they are not in a position to raise any objection as to the verdict and judgment for the state, since, if they are not related to O'Connor and are not entitled to inherit his estate, they cannot be prejudiced by the judgment entered for the state.

During the trial evidence was offered by different groups of claimants, tending to show that the claimants bore a physical resemblance to O'Connor, and in most instances this evidence was excluded. In some instances it was admitted without objection, and in others it appears to have been admitted over objection. Complaint is made because the evidence was not admitted by those who offered it, and because it was admitted in some instances as to another group of claimants, when offered.

Two of the groups of claimants complain of rulings of the trial court in admitting evidence tending to prove that there existed between the deceased and some of the other groups of claimants a personal physical resemblance. Since the verdict was against the latter group, the error, if any, was harmless. Harmless error is not a ground for reversing a judgment.

Two of the groups allege error in the exclusion of evidence tending to prove a resemblance in personal appearance of some members of the respective groups to the de-

ceased. The position of some of the groups is inconsistent. They objected to such evidence when offered by other claimants, and in nearly every instance the objections were sustained, but complain when a like ruling is made against them. Under such circumstances, this court could properly decline to consider the alleged error. We prefer, however, to consider the question on its merits.

There is a contrariety of judicial opinion on admissibility of evidence of personal resemblance to prove consanguineous relationship. In England, the prevailing view is in favor of its admission. Formerly this view was, to some extent, followed in this country. The trend in later years has been either adverse to or for a modification of the English rule. So far as we are at present advised, this court has passed upon the question in filiation cases only, and has held that it is improper in such proceedings to exhibit the child to the jury for the purpose of showing its personal resemblance to the putative father, as tending to prove the relationship of parent and child.

In *Hutchinson v. State*, 19 Neb. 262, in an opinion by Reese, J., it was said: "A number of authorities are cited which hold that it is improper to introduce or present a child to a jury for the purpose of permitting the jury to draw conclusions as to its paternity from a supposed resemblance to the alleged father, unless by a difference in color or some other marked characteristic the resemblance or want thereof can be clearly shown."

In *Ingram v. State*, 24 Neb. 33, where counsel for the prosecution, in a filiation proceeding, directed the prosecutrix to turn the face of the illegitimate child so that the jury could observe it, an objection was made and sustained by the court, and the ruling apparently approved.

In *Esch v. Graue*, 72 Neb. 719, the following language from the opinion in *Hanawalt v. State*, 64 Wis. 84, was cited with apparent approval: "In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child." And Barnes, J., in writing the opinion com-

mented as follows: "This rule seems to have been approved by us in *Ingram v. State*, 24 Neb. 33. In fact it is believed that the great weight of authority now holds that a child less than two years of age may not be exhibited to the jury for the purpose of showing its likeness to the defendant in a bastardy proceeding."

It is a well-known fact that there are distinct racial characteristics, especially as to the color of skin, hair and eyes. As a rule the North American Indian has black eyes, straight black hair, brown or copper-colored skin and prominent or high cheek bones. The African has black or dark skin, black eyes, hair kinky and black, and he usually has thick lips and a rather flat nose. Other races possess distinct characteristics. To a somewhat lesser degree there are distinctive personal characteristics in people of the same nativity. Usually, the Norwegian and Swede have light complexion, light-colored hair and eyes, while the people of Southern Italy, Spain and Mexico are usually swarthy, with dark hair and eyes. It is also a well-known fact that frequently peculiar and distinctive physical characteristics do exist in members of the same family, and that particular traits and physical characteristics may be transmitted from parent to child. On the other hand, it is a well-known fact that members of the same family may be entirely different from each other and have, apparently, no points of resemblance in personal appearance. Also, it is well known that very strong personal resemblances frequently exist between persons who are wholly unrelated. The fact that particular traits and marked physical characteristics are shown to exist between two individuals may be of slight worth in determining whether they are related by consanguinity; yet such fact, where it exists, is a circumstance that may be considered, with other evidence, in determining the question of relationship.

The decisions, in bastardy proceedings, holding that the resemblance between child and the putative father is not admissible, are grounded upon good reason. It is a well-known fact that a child of very tender years, ordinarily,

has no decidedly marked features, and that the family characteristics, if any, are not developed in early infancy. We think the proper rule to be deduced is that evidence of general resemblance of one individual to another should not be admitted for the purpose of establishing a relationship by consanguinity, but, where specific traits and particular or peculiarly marked physical characteristics are shown to exist, that evidence thereof should be received and the weight of such evidence left to the jury.

Applying this rule to the facts in the instant case, as disclosed by the record, we find that most of the excluded evidence was that of a general resemblance and was, therefore, properly excluded. Other evidence offered along this line did not disclose that the person testifying had a personal knowledge of either the peculiar traits or marked physical characteristics of the deceased, or of the member of claimants' family to whom it was sought to establish a resemblance. We find no prejudicial error committed by the trial court in the exclusion of such evidence.

Two groups of claimants assert that there was error in permitting counsel for the state to close the arguments to the jury. The Burgoyne claimants, particularly, contend that, since they were directed to first introduce evidence and to open the arguments to the jury, their counsel should have been permitted to make the closing argument.

It is a general rule in the trial of an action that the party against whom judgment would go if no evidence were introduced is entitled to open and close the arguments to the jury. This rule, however, is not applicable to all classes of cases. In the instant case, each group of claimants would fail and judgment go against each group if no evidence were introduced. Likewise, if no evidence were introduced, no judgment could go in favor of the state. It is a situation where each of the four interested parties would lose if no evidence were introduced. It is impossible that each should have the opening and each have the close of the arguments to the jury. The general rule, therefore, is not applicable to the situation here presented.

In *Bays v. State,* 6 Neb. 167, where a matter of practice arose as to which there was no statutory provision applicable, this court said: "In the practice of the courts contingencies not infrequently arise which the legislature has not anticipated by any suitable provision. These must be met by some general or special rule of court suited to the exigency, and which shall protect suitors in all their legal rights." The language in the above case is quoted with approval in *Lindley v. State, ante* p. 597.

Where, in the trial of a case, a situation arises regarding the practice that should obtain, and where there is no statutory rule, or none has been enunciated by the court which is applicable, the matter rests in the sound discretion of the trial court, and no error may be predicated on its exercise of such discretion unless an abuse thereof is disclosed. In the instant case, the trial court directed the Burgoyne claimants to first introduce evidence, followed in turn by the O'Connor and Beebe claimants, and then the evidence for the state, and each group of claimants and the state, in turn, were permitted to offer rebuttal testimony. The trial court directed that arguments be made to the jury, first by the Burgoyne claimants, followed by the other claimants and the state in order, and permitted each group of claimants and the state, in the same order, to reply to the principal arguments made by the respective parties. This ruling of the court was fair and reasonable to all parties, and it does not appear to have been prejudicial to any. The rule of procedure adopted by the trial court meets with our approval.

Some of the claimants contend that the trial court should have heard the cases without the intervention of a jury; that it was error to submit the questions of fact to the jury, and that they are entitled to a trial *de novo* upon the issues in this court.

The only statutory provision, requiring a trial *de novo* on questions of fact in this court in cases brought here by appeal, is contained in section 9150, Comp. St. 1922. That section is as follows: "In all appeals from the district court

to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact, reach an independent conclusion." The same question was presented to this court in *In re Estate of O'Connor*, 114 Neb. 266, wherein it was held: "A proceeding begun in the county court, to determine whether petitioners are next of kin and heirs at law of a decedent, does not present a case calling for the exercise of equitable jurisdiction, and does not fall within the provisions of section 9150, Comp. St. 1922, requiring a trial of the issue of fact *de novo* in the supreme court."

In the case last cited the trial court adopted the findings of fact made by the jury and rendered judgment upon its findings as well as upon the verdict of the jury. This was evidently a precautionary measure taken by the trial court. We might rest this question without further discussion, but the question seems to be recurring from time to time in the trial courts as to whether, in actions of this character, the litigants are entitled to a trial by jury.

Formerly, civil actions were brought to this court by error proceedings, except in equity matters, where they would be brought by appeal. While that condition of the law existed, this court, by Norval, J., rendered an opinion in *Whalen v. Kitchen*, 61 Neb. 329, in which it was held that this court could not review, on appeal, decisions made by a county court in the settlement of the estate of a deceased person, and that such decision could only be reviewed in this court by error proceedings. This opinion recognized that the action was essentially and in all respects legal in its nature, as distinguished from equitable. The rule there announced was applied and followed in *Boales v. Ferguson*, 2 Neb. (Unof.) 172.

While the proceeding for the settlement of estates of deceased persons is statutory, in the absence of regulatory

statutory provisions, the trials in such matters must be governed by those applicable to the trial of civil cases at law, rather than in equity. It was observed by this court in *In re Estate of O'Connor*, 114 Neb. 266, in a like situation, that no equitable doctrine is invoked and the application of no principle of equity is required in the determination of the issues presented in cases of this character.

In proceedings to determine whether claimants are next of kin to a decedent and entitled to inherit his estate, only questions of fact are involved. In the recent case of *In re Estate of Buder, ante*, p. 52, a similar question was presented. In the course of the opinion this language may be found: "The only question for the county court to determine was, who were the legal heirs of Marie Buder. This question is purely legal; no equitable considerations affect it, and in the absence of the alleged contract would be perfectly simple." Since the proceeding is purely legal in its nature, the parties litigant were entitled, in the district court, to a jury trial.

The Burgoyne claimants assert error in that the jury returned a verdict in less than six hours and that it was a five-sixths verdict. In civil actions the statute permits a jury, after deliberating six hours, to return a verdict signed by five-sixths of their number. In the instant case, the record discloses that more than six hours elapsed after the submission of the cases and before a verdict was received, and it fails to disclose that the jury were not deliberating during this entire time. Error is not shown in this respect.

The Burgoyne claimants complain of the giving of instruction No. 4, in which the brother of Margaret O'Connor is referred to as of Washburn, implying that O'Connor, deceased, had at some time lived in Washburn, Wisconsin. A careful examination of the instruction shows that it was outlining to the jury who were the several groups of claimants, and the reference was, evidently, to the fact that Margaret O'Connor, mother of the Burgoyne claimants, had a brother, John O'Connor, and the question for

the jury to determine was whether the deceased was a brother of Margaret O'Connor of Washburn. The instruction is not subject to the criticism made, and it does not recite that O'Connor, deceased, ever resided in Washburn, Wisconsin, and, had it done so, it is difficult to see how it could have prejudiced any claimant. An instruction that is not prejudicial to the complaining party is no ground for reversal of the judgment.

The Burgoyne claimants further complain of the refusal to give two instructions, one of which would have directed a finding against the O'Connor claimants, and the other relating to the weight of expert testimony on handwriting. With respect to the refused instruction, it appears that the jury found against the O'Connor claimants. The refusal to give the instruction did not harm the Burgoyne claimants. The one relating to the weight to be given expert testimony seems to be a correct statement of the law, but the general instructions that were given by the court seem to be sufficient to cover every phase of the weight to be given to any testimony offered in the case, and no error is shown in the refusal to give the requested instruction.

The O'Connor claimants complain of the refusal to give a group of several instructions, and also complain of the giving of a group of several instructions. Under the rule well recognized in this court, such an assignment requires only an examination sufficient to show that any one of the group of instructions given was properly given, and that any one of the group refused was properly refused. An examination of the group given and the group refused shows clearly that most, if not all, of those given were properly given, and that at least a number of those refused were properly refused.

Each set of claimants complain that the verdict is not sustained by the evidence, and the Burgoyne claimants, in particular, contend that the evidence is sufficient to have required a verdict in their favor. We have carefully read the entire bill of exceptions, consisting of many hundreds of pages, and have carefully scrutinized every exhibit of-

fered, whether received or rejected, and, while the evidence in behalf of the Burgoyne claimants, standing alone, is quite strong, yet, when the cross-examination of their witnesses, the unreasonableness of the testimony given by some of them, and the contradictory evidence given by other witnesses are taken into consideration, the record simply presents a case where the evidence is in conflict. The weight and value of such evidence were for the jury to determine, and their verdict is conclusive on the questions of fact to them submitted.

At a term of court subsequent to that of the trial, the Beebe claimants filed a second motion for a new trial, based upon the ground of newly discovered evidence. This motion was by the district court overruled, and from the overruling thereof the Beebe claimants have prosecuted a second appeal.

In *Parkins v. Missouri P. R. Co.*, 79 Neb. 788, this court held: "A new trial will not be granted upon the ground of newly discovered evidence, where such evidence is merely cumulative and would not, in all probability, affect the result if a new trial were granted." The same rule was adhered to in *Kraus v. Clark*, 81 Neb. 575. The evidence which the Beebe claimants assert is newly discovered was only cumulative in its nature, and it does not appear that it was likely to have been of such import or weight as would have resulted in a different verdict, had a new trial been granted. Morever, O'Connor had been dead for more than a decade when the trial occurred, and no reason is shown why these claimants could not have obtained any evidence that they desired, if they had been diligent. We find no error in the overruling of the Beebe claimants' motion for a new trial.

There are numerous other assignments of error which we deem unnecessary to discuss, but we have considered and examined each and every one.

No error prejudicial to any group of claimants has been found. The judgment of the district court is therefore

AFFIRMED.

R. O. BROWNELL, RECEIVER OF THE FIRST BANK OF NICKERSON, APPELLANT, V. W. A. ANDERSON ET AL., APPELLEES.

FILED NOVEMBER 23, 1928. No. 26270.

1. **Banks and Banking**: STOCKHOLDERS: LIABILITY: REMEDY. "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders." *Rogers v. Selleck, ante*, p. 569.
2. ———: ———: ———: PROCEEDINGS BY RECEIVER. A receiver of an insolvent state bank, duly appointed by the district court, lodged with the county court a contingent claim for double stock liability against the estate of a deceased stockholder, then being administered by it. *Held*, (a) that the filing of such claim did not vest the county court with exclusive jurisdiction over it, and neither did such filing deprive the receiver of the right to proceed in the district court appointing him, in a suit in equity, to determine the liability of such stockholder; (b) that the executor of such estate was a proper party defendant; (c) that it was the duty of the county court to direct the executor to retain in his hands sufficient of the assets to pay such contingent claim when the same became absolute.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Dolezal, Spear & Mapes, C. M. Skiles and *Ira D. Beynon*, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

Heard before GOSS, C. J., DEAN, THOMPSON, EBERLY and HOWELL, JJ., and CHASE and REDICK, District Judges.

THOMPSON, J.

This action was instituted by appellant, the receiver of the First Bank of Nickerson, against the appellees by way of a petition in equity, in due and usual form in such cases, to enforce the double liability of appellees as stockholders of the above insolvent bank under sections 4 and 7, art. XII of the Constitution of this state. At the trial the ap-

pellee, Seymour S. Sidner, as executor of the estate of John Sidner, deceased, filed a special appearance which challenged the jurisdiction of the district court over him, as well as over the subject-matter. The court sustained the challenge and dismissed the action, to reverse which the receiver appeals and presents as reasons for such reversal, in substance, that, under the facts shown by the record and the law applicable thereto, the special appearance should have been overruled and appellant permitted to proceed with his action to final judgment.

The facts material for our consideration, as shown by the record, are: The First Bank of Nickerson is one organized under the laws of this state for commercial banking business at Nickerson, in Dodge county. The appellees, defendants, with others were and are stockholders in the bank, one of whom, as above indicated, was John Sidner, who died testate a resident of Dodge county on August 15, 1923. On September 10, 1923, in the county court of such county, the will was admitted to probate, and Seymour S. Sidner, appointed executor, who qualified and entered upon the discharge of his duties, and has been ever since so acting. On July 10, 1924, the bank was, by the district court for Dodge county, adjudged insolvent and Emil Folda appointed receiver, who subsequently resigned and R. O. Brownell, the appellant, was appointed his successor. On August 29, 1924, the receiver filed in the county court, in the matter of the estate of John Sidner, a contingent claim, in substance, as follows: That he, as receiver of the above named bank, was then engaged in ascertaining and assembling the assets and liabilities thereof; that such John Sidner at the time of his death was the owner of 20 shares of the capital stock of the bank of the par value of $100 a share; that on January 11, 1924, the county court, in the course of administering the Sidner estate, entered an order barring claims, which, however, was about six months prior to the appointment of Folda as receiver; that on August 22, 1924, the executor of such estate filed his first report and petition for discharge,

which was set for hearing September 15, 1924, all as shown by the record of such county court; that on information and belief claimant states there will be a liability by reason of such stock subscription and ownership against the Sidner estate which is not now ascertainable, but which may reach the sum of $2,000 when fully accrued; and then prayed "that final discharge of said executor be deferred until the receiver's claim is ascertained, or that he be directed by the court to retain from distribution sufficient of the assets of said estate to pay this claim when ascertained and proved, and for such other and further relief as may be appropriate in the premises." This record further shows that every condition precedent necessary to the bringing of this action has been had, and, as hereinbefore indicated, such conditions in usual form are set forth in appellant's petition.

On the record as hereinbefore disclosed, appellee contends that on the probate of the will, the qualification of the executor, and the filing of the contingent claim by the receiver, the county court became vested with exclusive jurisdiction of the matters involved herein. Then, as to appellant's challenges to the judgment of the trial court, appellee asserts: "(1) This is an action for a money judgment only, so far as this appellee is concerned. (2) The district court has no jurisdiction over the executor in this action." In our opinion, these contentions of appellee were approved and followed by the trial court. Appellee relies on section 1374, Comp. St. 1922, and our holdings in *Burke v. Scheer*, 89 Neb. 80; *Dickinson v. Kline*, 96 Neb. 435; *Drainage District v. O'Neill*, 109 Neb. 552; and *Hill v. May*, 115 Neb. 690. Section 1374 of our statutes provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in this chapter; nor shall any attachment or execution be issued against the estate of the deceased until the expiration of the time limited by the court for the pay-

ment of the debts, except in the action mentioned in this chapter."

Thus, the question is: Is the action in the district court, under this record, one for the recovery of money only? That part of the opinion in *Drainage District v. O'Neill, supra,* material here is: "A demurrer for misjoinder of causes of action is properly sustained where the suit is brought on four distinct bonds, signed by different sureties and where several judgments are prayed"—purely a law action. In the recent case of *Rogers v. Selleck, ante,* p. 569, involving the liability of stockholders in insolvent state banks, wherein our previous holdings on this subject were reviewed, we held: "The remedy for the enforcement of the entire double liability imposed by the Constitution upon stockholders of a state bank in the event of insolvency is a suit in equity by a creditor for the benefit of all the creditors, or by the receiver, against all the stockholders. Dicta to the contrary in *Burke v. Scheer,* 89 Neb. 80, and in *Dickinson v. Kline,* 96 Neb. 435, disapproved." Further, in the course of the opinion in the *Rogers* case, we distinguished the case of *Hill v. May, supra,* and in so doing stated: "The controlling question therein decided is not involved in the present inquiry. The opinion properly holds that a suit on a promissory note given by a stockholder for an assessment of stock to restore the reserve or the solvency of a bank was an action at law."

Hence, we conclude that this action is not one for the recovery of money only, does not come within the prohibitions contained in the above quoted section 1374, and is not controlled by our holdings in *Burke v. Scheer, Dickinson v. Kline, Drainage District v. O'Neill,* and *Hill v. May, supra.*

This leaves for our consideration the effect of the receiver's filing with the county court the contingent claim referred to herein. The record shows it to have been lodged at the earliest opportunity. It was necessary to a fair distribution of the assets that the probate court have the information it afforded, and that such court grant the relief prayed. The Constitution, so far as involved, clothed

the district court, under our decisions, with authority to administer the trust imposed by its taking charge of the assets of such insolvent bank. Until it had acted and finally determined that a stock liability existed, and the extent thereof, neither the receiver nor the county court could proceed in any other or different manner than that pursued by the receiver in these respective courts. The course followed by the receiver is in harmony with section 1359, Comp. St. 1922, which reads as follows: "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which, if satisfied that such claim is a legal demand against said estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute, or if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of other creditors."

The filing of the contingent claim in the county court did not vest such court with exclusive jurisdiction over the claim, nor was the district court, by reason thereof, deprived of its right to proceed to a final determination of the cause of action presented by the receiver's petition against the executor, as well as the other defendants named.

Therefore, the trial court erred in holding that it was without jurisdiction, and in entering judgment dismissing the suit.

Our conclusions herein find support in *Hazlett v. Blakely*, 70 Neb. 613, 621.

The judgment of the district court is reversed and the cause remanded, with directions to proceed in harmony with this opinion.

REVERSED.

LUCY MULLER, GUARDIAN, APPELLANT, V. ERNEST A. HARMS ET AL., APPELLEES.

FILED NOVEMBER 28, 1928. No. 26156.

Executors and Administrators: LEASE BY ADMINISTRATOR. Under the statute granting to an administrator the right to possession of decedent's real property and to the rents thereof "until the estate shall have been settled," an administrator's lease for a longer period is not necessarily "void," as distinguished from "voidable," but may be accepted and ratified by mutual consent of the lessee and the heirs and continued in full force after the settlement of the estate and the discharge of the administrator, the heirs subsequently receiving the rent. Comp. St. 1922, sec. 1320.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Fischer & Fischer and *J. Gerald MacVeigh,* for appellant.

J. C. Travis, contra.

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

ROSE, J.

This is an action to recover $450, the amount of a claim for two monthly instalments of unpaid rent, each for $225. The property for which rents are claimed is the Apollo Theatre at 2824 Leavenworth street, Omaha. It was formerly owned by Fritz Muller, now deceased. He left surviving him his widow and their two minor sons, Walter Frederick Muller and Paul Ernest Muller. Charles B. Schleicher, administrator of decedent's estate, entered into a lease demising the Apollo Theatre to Ernest A. Harms and Mathilda A. F. Harms for a term of five years for $13,500 payable in instalments of $225 on the first day of each month beginning January 1, 1926. The lease was in writing and was formally executed by lessor and lessees. The latter paid the monthly rents from January 1, 1926, until October 1, 1926, but in the meantime, September 24, 1926,

gave notice that they would terminate their tenancy October 31, 1926. The attempt to do so was resisted and this suit was brought to recover the instalments due under the lease November 1, 1926, and December 1, 1926. The administrator settled decedent's estate and was discharged. These and other facts were pleaded in detail by plaintiff. The plaintiff is Lucy Muller, guardian of the two minors. The lessees are defendants.

To the petition a general demurrer was interposed by defendants and sustained by the court. Plaintiff refused to plead further and her action was dismissed. From that judgment she has appealed.

Plaintiff contends as pleaded that defendants are bound by the lease and that they are indebted to her for two months' rent. Defendants take the position that the administrator had no power to make the lease and that it was void, because it provided for a long tenancy after the settlement of decedent's estate. A determination of the controversy requires consideration of additional facts stated in the petition. When Fritz Muller was owner of the Apollo Theatre he leased it to defendant Ernest A. Harms December 1, 1922, for a term of three years beginning January 1, 1923. The consideration named was $6,300 payable in monthly instalments of $175 each. A chronology of events fully pleaded by plaintiff in her petition follows:

November 4, 1923, Fritz Muller died, leaving a will devising the Apollo Theatre to his two minor sons, Walter Frederick Muller and Paul Ernest Muller—a will subsequently probated; January 22, 1924, Charles B. Schleicher granted letters of administration with the will annexed; April 8, 1925, and prior thereto, defendants solicited the administrator and also Lucy Muller, mother and natural guardian of the two minors, for a new lease extending the tenancy beyond the terms of the old and offering increased rents; April 8, 1925, administrator, with the consent and approval of plaintiff, under authority of the county court, accepted the offer of defendants and with them entered into a lease demising the Apollo Theatre to them for a term

of five years for $13,500, payable in monthly instalments of $225 each, beginning January 1, 1926; April 9, 1925, Lucy Muller appointed and qualified as guardian of the minors; May 27, 1925, entry of decree by county court that the Apollo Theatre passed to the minors by will of their father; May 27, 1925, final account of administrator approved; June 2, 1925, debts paid and estate distributed; January 14, 1926, administrator discharged, leaving plaintiff as guardian in control of the persons and the property of her two minor sons. September 24, 1926, defendants notified plaintiff they would terminate their tenancy and vacate the premises October 31, 1926. The facts summarized were fully stated in the petition.

By means of copies the will, the two leases and notice of lessees' purpose to terminate the tenancy were included in the petition. Plaintiff alleged also that defendants paid to her the rent under the first lease from July 1, 1925, to and including December, 1925, and under the new lease from and including January, 1926, to and including October, 1926; that the rent for November and December, 1926, is due and unpaid.

In argument by defendants on the proposition that the period of tenancy extended beyond the tenure of the administrator as such and that consequently his lease was void, reference was made to the following provisions of statute:

"The executor or administrator shall have a right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control." Comp. St. 1922, sec. 1320.

This statute does not declare that agreements made by an administrator in excess of the powers granted are void. An authoritative opinion of this court so holding has not been cited or observed. Attention, however, was called to

Hollman v. Pattison, & Co., 104 Neb. 313, where the syllabus contains a ruling that "an administrator cannot lease an estate of which he is administrator beyond his term of office," but upon a reconsideration of that case the syllabus was withdrawn. *Hollman v. Pattison & Co.*, 104 Neb. 846. Contractual obligations exceeding authority granted or limited by statute, when not declared invalid by the lawmakers, have often been enforced. *Smith v. First Nat. Bank of Chadron*, 45 Neb. 444; *Bank of College View v. Nelson*, 106 Neb. 129; *Simmons v. Farmers Union Cooperative Ass'n*, 114 Neb. 463; *Nebraska Nat. Bank v. Parsons*, 115 Neb. 770. At most the statute made the lease voidable upon a timely exercise of a right to declare it void. Under the statute heirs and devisees of a deceased person are protected in their right to the possession and control of their property upon the settlement of decedent's estate and the discharge of the administrator. He entered into the new lease for the benefit of the two minor devisees, with the approval of their mother, the natural guardian. After execution of the lease, and the discharge of the administrator, while defendants were in possession of the property as lessees, the guardian and the county court elected for the minors to take advantage of the new lease, thus enhancing the value of their patrimony. This election was a proper exercise of power committed by law to the guardian and the county court. *Gentry v. Bearss*, 88 Neb. 742. Defendants approached the administrator for the new lease extending the term of the tenancy while he was in control of the property, and he accepted their offer with the consent of the natural guardian in addition to authority from the county court. The transaction was free from even a suspicion of fraud on the part of either the administrator or plaintiff. After the administrator was discharged the new lease was effective for the purpose of enabling defendants to retain possession of the property for their own benefit beyond the period fixed by the first lease. By paying to plaintiff for several months the increased rent as stipulated and by continued occupa-

tion of the leased premises, defendants recognized plaintiff as the guardian, as the lessor and as the administrator's successor. The lease was thus accepted by both plaintiff and defendants. Plaintiff received her rent and defendants continued to occupy the premises as tenants. Without the consent of plaintiff the lease was not open to rejection by defendants when they gave notice that they would terminate their tenancy.

The demurrer was erroneously sustained. As a result of the error the judgment of the district court dismissing the action is reversed and the cause remanded for further proceedings.

REVERSED.

HARRY L. ASHTON, APPELLEE, V. BLUE RIVER POWER COMPANY ET AL., APPELLANTS: IOWA-NEBRASKA LIGHT & POWER COMPANY, INTERVENER, APPELLANT.

FILED NOVEMBER 28, 1928. No. 26598.

1. **Abatement:** WAIVER. The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action, but this right of abatement may be waived.
2. **Jurisdiction.** Under the facts disclosed by the record in this case and as set forth in the opinion, the district court for Seward county, Nebraska, did not err in retaining jurisdiction of this cause and in determining the same upon its merits.
3. **Master and Servant:** INJURY TO SERVANT: LIMITATIONS. Where, after a compensable injury has been suffered, neither of the parties in interest institute proceedings to secure an adjudication of the matters involved in the accident, and there is no evidence of a valid agreement of settlement between the parties that in any manner conforms to the requirements of the compensation statute, but by or with the direction or consent of the employer payments of compensation are promptly commenced and thereafter continued to the employee for a period of time, the limitations provided by section 3061, Comp. St. 1922, shall not take effect until the expiration of one year from the time of making the last of such payments.
4. ———: EMPLOYERS' LIABILITY ACT: INTERPRETATION. The

interpretation of subdivision 3, sec. 3044, Comp. St. 1922, in conjunction with subdivision 1 of the same section, as announced in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, followed and applied in *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332, and *Davis v. Lincoln County, ante*, p. 148, again followed and again approved.

5. "Wilful Negligence." In the absence of intoxication on part of of the injured party, wilful negligence may be defined as (1) a deliberate act; or (2) such conduct as evidenced reckless indifference to safety. As a statutory term it involves more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in a degree, a willingness to take a chance.
6. Evidence examined, and *held* to support the judgment of the district court.

APPEAL from the district court for Seward county: LOUIS LIGHTNER, JUDGE. *Affirmed.*

Thomas & Vail, for appellants.

T. L. Norval, H. L. Ashton and *Frost & Kinsinger, contra.*

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

EBERLY, J.

This is a proceeding under the workmen's compensation act. Ashton, as claimant, was awarded compensation for personal injuries against his former employer, the Blue River Power Company, and its successors in interest. An appeal to the district court for Seward county, Nebraska, was then prosecuted by the defendant companies which resulted in the confirmation of the award made. From this judgment, the defendants appeal to this court.

The following facts of the transaction involved may be deemed of importance. Ashton, an experienced electrician, was employed by the Blue River Power Company on February 1, 1923, at an agreed compensation of $200 a month. On September 21, 1923, his employer sent him to

Adams, Nebraska, to perform an emergency job—connecting up the company's high tension transmission line with the local distributing system. In the course of his employment, he received severe electric burns on his left hand and arm, and severe electric burns on the soles of both feet, in addition to the shock which accompanied these injuries. The hand and arm injuries resulted in the amputation of one arm six inches below the elbow. All medical testimony on the subject is in agreement that the injuries to both feet were properly classified as third degree burns —burns which extended deep into the tissues. The employer, through its officers, had actual notice of the accident and the injuries occasioned thereby on the day of its occurrence. Claimant was thereafter, during his convalescence, continually under the care and in charge of surgeons selected and employed and paid by the employer. The doctors appearing as witnesses at the trial also agreed that the impairment of each of appellee's feet, due to these injuries, will be permanent in nature and from 20 to 25 per cent. disabled.

Under the foregoing facts, that actual knowledge by the employer of the fact of the accident and of the general nature and extent of the injuries occasioned thereby was acquired substantially as of date of the occurrence cannot be gainsaid.

The first question presented in behalf of the appellants is that the trial court erred in failing to sustain their request for a stay of proceedings until it should be determined finally whether the Lancaster county district court "was right in assuming jurisdiction of a prior appeal to that court from the same award of the compensation commissioner." Appellants contend that an appeal from an award by the compensation commissioner is in the nature of a transitory action, and an action within the jurisdiction of any district court of this state; and if a petition on appeal be filed in such court and a general appearance made by the adverse party, jurisdiction will be acquired even though the county be other than the residence of the em-

ployer; that, therefore, when appellant on October 19, 1927, properly commenced his proceeding for review in the district court for Lancaster county, Nebraska, and caused the statutory summons or notice to issue thereon, which was thereafter properly served upon claimant, jurisdiction attached as of the date of the commencement of this action; that this jurisdiction was not divested by the fact that the appellants, being in doubt as to the proper forum, on October 20, 1927, commenced an identical proceeding for review in the district court for Seward county, Nebraska, and caused a proper summons to be issued and duly served on the claimant in Seward county, Nebraska, which, in turn, in the orderly course of proceeding, was followed by the filing of complainant's answer to the appellants' petition filed in the district court for Seward county, Nebraska.

It is to be remembered in this connection that both summonses, though issued respectively from Lancaster and Seward counties, were served on the claimant on the same day in Seward county, Nebraska.

It may be conceded for the purpose of this appeal that the record here discloses that, solely as the result of appellants' own acts, two cases on appeal were pending in the district courts of this state involving the same subject-matter and seeking the same relief. True, it may also be conceded that neither was intended by appellants to be vexatious, and that both were commenced in good faith solely out of abundance of caution.

This court is committed to the doctrine that "The pendency of a former suit between the same parties may be shown in abatement when a judgment in such suit would be a bar to a judgment in the second action." *State v. North Lincoln Street R. Co.*, 34 Neb. 634. It may further be conceded for the purpose of this appeal that this principle is applicable to the proceeding now before us. But, "The principle on which pleas of another action pending are sustained is that the law, which abhors a multiplicity of suits, will not permit a defendant to be harassed and

oppressed by two actions for the same cause where plaintiff has a complete remedy by one of them." 1 C. J. 45, sec. 38.

This court is committed to the doctrine that this right of abatement may be waived. *Gregory v. Kenyon*, 34 Neb. 640.

As this multiplicity of proceedings before us is solely the result of appellants' acts as moving party in prosecuting by appeal, they may be considered as possessing the status of a "plaintiff." Claimant is therefore the sole injured party. Within the reason of the rule, he only may invoke or waive it, and he has expressly waived its provisions so far as Seward county proceedings are concerned. Furthermore, the Lancaster county district court, in the proceeding had before it, while overruling the special appearance of claimant and his objections challenging the jurisdiction, concluded: "It is further suggested that this trial be continued until after the trial of the same action in Seward county, Nebraska." It follows that the contention that the district court for Seward county, Nebraska, erred in retaining jurisdiction of this cause and in determining the same upon its merits cannot be sustained.

Section 3061, Comp. St. 1922, is urged by appellants as a complete defense to claimant's action. Preliminary to the examination of this contention it is to be remembered that, after the occurrence of an accident of a compensable nature, our statute requires, (1) the employer or insurance company shall truthfully report the same to the compensation commissioner (this is wholly *ex parte* and is a matter in which the employee has no part); (2) the employee shall then, if he desires to secure the benefit of the statute, bring knowledge of his accident to the employer as soon as practicable and make claim for compensation within six months after the occurrence of the injuries; (3) thereupon either the employer or employee may file a petition with the compensation commissioner and have the matter of liability adjudicated.

In addition, our compensation statutes further provide:

"The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article: Provided, that a copy of such settlement shall be filed with the compensation commissioner, and no such settlement shall be binding unless in accord with the provisions of this article." Comp. St. 1922, sec. 3059.

The provisions last quoted should be read in connection with the following provisions: "The commissioner of labor of the state is hereby made the compensation commissioner and there is hereby imposed upon him the duty of executing all of the provisions" of our compensation legislation and acts amendatory thereto. Comp. St. 1922, sec. 3076.

It is also expressly provided: "No agreement by an employee to waive his rights to compensation under this article shall be valid." Comp. St. 1922, sec. 3054.

"All settlements by agreement of the parties with the approval of the compensation commissioner and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment: Provided, however, no settlement shall be final unless it be in conformity with the provisions of this article, a finding by the compensation commissioner, the district court or any appellate court." Comp. St. 1922, sec. 3064.

In respect to the provisions above quoted, the public has an interest in their due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties. The act of which they form a part creates new remedies and new liabilities. The manner in which it operates is to be found within the legislation itself. *Perry v. Huffman Automobile Co.*, 104 Neb. 211.

There is no question that neither of the parties in interest instituted proceedings to secure an adjudication of the matters involved in the accident before the compensation commissioner, and there is no evidence of a valid agree-

ment of settlement between the parties that in any manner conformed to the requirements of the statutes above quoted either as to compensation for the loss of a hand or covering the other disabilities suffered at the time.

It may also be inferred from the evidence, in view of the terms of a report from the office of the department of labor, that a complete report as to the nature and extent of the accident, suffered by claimant, and the injuries resulting therefrom, had not been made by the employer to the office of the department of labor, as required thereby.

Under the circumstances detailed, the weekly payments of $15 a week, which had commenced shortly after the occurrence of the accident, were continued until the payment made in January, 1927, after which payments ceased and further payments were refused. Claimant commenced his proceeding before the compensation commissioner on August 2, 1927, to secure the statutory award. Appellants met this demand with the contention that the following language of section 3061, Comp. St. 1922, wholly barred claimant's proceeding thus commenced: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (3062) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment."

Is plaintiff barred, or is his right to compensation within the exception created by the statute?

The language quoted, in the exact form it appears above, also appears in the Pennsylvania legislation on this subject, and in construing the same the supreme court of that state said: "Does section 315 bar the claim? The latter part of this section reads: 'Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from

the time of the making of the last payment.' This section was placed in the act to prevent imposition on unwary employees; that is, to prevent money being paid for a period of time after an injury under some verbal arrangement, causing the employee to neglect presenting the agreement in some form as provided by law. The year limitation, under the act, would begin to run from the last payment." *Chase v. Emery Mfg. Co.*, 271 Pa. St. 265.

But appellants contend that the payments of compensation were, in fact, appropriated to and limited for injuries occasioned by the loss of a hand exclusively, and insist that the appellee is seeking to recover for injuries for which no payments have ever been made, and, therefore, as to injuries to the feet the bar of the statute is applicable. The trouble is, however, that the district court evidently found to the contrary, and the evidence in the record supports that conclusion.

The evidence of the plaintiff is wholly uncontradicted that, shortly after his injuries and when the conditions of his feet and hand and arm were equally obvious, the secretary and general manager and assistant manager of his employer visited him in the hospital and told him "not to worry, but go home and try to get well, and he would be taken care of;" that the insurance carrier thereafter commenced the payment of $15 a week while he was in the hospital; that there was nothing of a restrictive character in or connected with the vouchers or remittances which in any manner advised claimant that payments being made were for hand injuries only; that the amount paid was the equivalent of the maximum weekly payment if all injuries received were considered; that no notice of any kind was ever given at or prior to the time any of these payments were made by appellants of any specific appropriation to injuries occasioned by the loss of a hand exclusively.

It is thought that various injuries received as a result of one accident, in view of the policy evidenced by the statute, cannot be separated, and that compensation under the statute must be awarded for the disabilities created

thereby as an entirety. *Nebraska Nat. Guard v. Morgan,* 112 Neb. 432.

If, however, it be conceded that, under the policy of our statute, the several injuries received by a claimant may be segregated and considered as separate and unconnected items of indebtedness to which a bar of a statute of limitations is sought to be applied, it would also follow that—"Where a debtor remits money to his creditor without a request or instruction on what particular debt to apply the same, the creditor may apply the money upon any debt of his debtor which he chooses." *Lenzen v. Miller,* 53 Neb. 137; *Lau v. Blomberg,* 3 Neb. (Unof.) 124.

Indeed, "The weight of authority holds that the debtor must direct the application of his payment at or before the time of payment and that he cannot do so afterward." 30 Cyc. 1230.

At common law the creditor was not compelled to exercise his right of application at the time the payment was made, and while there was some conflict of authorities as to how long that right exists, the record before us discloses that the application was seasonably made to the indebtedness as an entirety; also, that the payments made were not accompanied by any distinctive appropriation by appellants, but that they were continued three years without informing appellee in any way of the purpose to pay only for the loss of the hand. They did not notify appellee until long after the whole of the term in which appellee would have been required to file his petition, had no payments been made, had fully expired. The purpose of the statute was to prevent just such a situation, and it clearly applies to the instant case.

The appellants challenge the recovery allowed by the trial court as being excessive and as not warranted by the terms of our compensation act, properly construed. So far as facts are concerned, the trial court found that the claimant, in addition to the loss of a hand by amputation, had suffered a permanent im-

pairment of, at least, 20 per cent. to each foot, and also 10 per cent. general impairment to his health.

It is to be remembered that findings of fact made by the district court in a compensation case will not be reviewed on appeal unless clearly wrong. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Miller v. Morris & Co.*, 101 Neb. 169; *City of Fremont v. Lea*, 115 Neb. 565.

The evidence in the record amply supports this determination of the trial court as to the extent and quality of the impairment suffered. On the basis of these facts so found, the district court adjudged that the complainant was entitled to compensation to the extent of "one-half of 100 per cent. total for hand plus 20 per cent. partial loss for feet, viz., 60 per cent. partial total disability, or 300 weeks at $15 a week, and $12 a week for the remainder of his life." This conclusion appellants challenge on the ground that the rule announced in *Frost v. United States Fidelity & Guaranty Co.*, 109 Neb. 161, is incorrect and erroneous and not justified by the terms of the statute construed. We have carefully reexamined this statute. Giving due consideration to the public policy involved, according to the language of the enactment, and to the full and complete meaning expressed by the terms employed, we are unable to accept the able and ingenuous arguments of counsel for appellants or agree with the conclusion for which they contend. We are impressed with the thought that the doctrine announced in *Frost v. United States Fidelity & Guaranty Co., supra*, is not only in accord with the literal terms employed by the legislators, but fairly expressive of the true legislative intent evidenced by this act. This case has been followed by this court in *Johnson v. David Cole Creamery Co.*, 109 Neb. 707; *Schlesselman v. Travelers Ins. Co.*, 112 Neb. 332; *Davis v. Lincoln County, ante*, p. 148. Three legislatures have convened and adjourned since the announcement of this rule without the adoption of any amendment to the controlling statute in this case.

Indeed, similar legislation in other jurisdictions has re-

ceived a similar construction. *Vishney v. Empire Steel & Iron Co.*, 87 N. J. Law, 481; *Orlando v. Ferguson & Son*, 90 N. J. Law, 553. We are therefore constrained to adhere to the rule thus heretofore announced by this court.

On the question of wilful negligence, insisted upon by the appellants, a careful consideration of the record confirms us in the belief that it is wholly unsupported by the evidence in the case. Conceding that appellee's negligence was contributory to the accident, it does not obtain the degree of wilful negligence. On this subject we are in full accord with the opinion of the trial judge who, in his written opinion, says: "It does not seem to me that a case of wilful negligence has been made out. Wilful negligence means a greater degree of negligence than mere negligence and a greater degree of negligence than gross negligence. I would hestitate to hold that the plaintiff was guilty of gross negligence, and I have no hesitancy at all in holding him not guilty of wilful negligence. My best judgment is that he was guilty of an error of judgment only. He was not guilty of a reckless indifference to his own safety. When he threw the switch, he believed that it was safe to do so. He was not willing to take a chance; he did not believe that he was taking a chance. His negligence was no greater in my opinion than that of the employee in *Farmers Grain & Supply Co. v. Blanchard*, 104 Neb. 637."

It follows that the action of the district court in its determination of the award of compensation to plaintiff is, in all things, sustained.

AFFIRMED.

JOSEPH WALTER ET AL., APPELLEES V. IGNATIUS WALTER ET AL., APPELLANTS.

FILED NOVEMBER 28, 1928. No. 26107.

1. **Tenancy in Common: POSSESSION BY COTENANT.** Possession by one cotenant of common property is presumed to be friendly as regards his cotenants; and before such possession can become adverse, notice that the tenant in possession is claiming the en-

tire estate in hostility to his cotenants must be brought home to the latter in some plain and unequivocal manner.

2. ———: ———: ADVERSE POSSESSION: NOTICE. Notice of such hostile claim may be shown by acts of the tenant in possession of such a notorious and hostile character as would put a man of ordinary prudence upon his guard; but acts which are reasonably consistent with the existence of title in his cotenants are not sufficient.

3. ———: ———: ———: ———. Exclusive possession by a cotenant, receipt of the rents and profits, payment of taxes and making ordinary improvements proper for the full enjoyment or use of the estate, however notorious and long continued, are not, of themselves, acts of such character as to give notice to his cotenants of a hostile claim.

4. ———: ———: ———. Acts which might be held to constitute a disseisin if done by a stranger may not have such effect if done by a tenant in common against the other tenant, because of the presumption that such acts are for the benefit of all cotenants.

5. ———: ———: ———: LACHES. The possession by a cotenant being presumed to be friendly, his cotenants are not chargeable with laches for failure to demand their share of the possession and profits, where they have no notice of a hostile claim by the tenant in possession.

6. ———: ADVERSE POSSESSION: DEED AS NOTICE. A quitclaim deed purporting to convey the entire estate by four heirs of a deceased cotenant to two other heirs of the same may be sufficient notice of a hostile claim of title by the latter to the cotenants of their deceased ancestor; but such a deed purporting to convey only the "apparent interest" of the grantors *in the estate of their deceased ancestor* will not have that effect; it merely releases their share of the estate which they held in common with the grantees—in this case one-fourth.

7. ———: AGREEMENT AMONG HEIRS OF DECEASED COTENANT. A "family arrangement" between the heirs of a deceased cotenant in possession is not binding upon cotenants of deceased, where they took no part therein, had no notice thereof and had no interest in deceased's estate.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Courtright, Sidner, Lee & Gunderson, for appellants.

Dolezal, Spear & Mapes and *Hugo F. Srb, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This case was presented to the commission, division No. 1, and an opinion written affirming the judgment of the district court. A motion for rehearing allowed, and reargument had before the court.

The action is in equity by two tenants in common to quiet title to certain lands against two of their cotenants and the heirs of a third cotenant. The claim of the plaintiffs is based upon adverse possession for a period of 10 years and involves a farm of 80 acres, which will hereinafter be designated as tract B. The history and chronology of the facts to be considered will now be stated.

Joseph Walter, Sr., in 1875, became the owner of the north half of the northwest quarter, section 8, township 20, range 5. This will be referred to as tract A, but it is not in controversy in this action. March 31, 1883, Joseph purchased from the Union Pacific Railroad Company the east 40 acres, and on June 9, 1888, the west 40 acres, which together constituted the south half of the northeast quarter of section 7, township 20, range 5. This is tract B, the land in controversy, and corners on tract A at the southwest. Title to both tracts was in Joseph Walter, Sr., who lived with his wife and family on tract A, farming the same in the usual manner. October 11, 1880, Joseph, Sr., and wife, Anna, entered into a contract with their son Anton whereby tract A was to be conveyed to Anton in consideration that he would deliver to Joseph and Anna Walter, so long as either of them should live, one-fourth of all crops raised thereon and permit them to occupy the north half of the house on said premises, and by the same contract personal property of the value of $150 was transferred to Anton. The deed was executed in pursuance of this contract and filed for record October 26, 1880, and

the contract October 27, 1880. The suggestion that the deed formed the entire contract of the parties because it contained no reservation finds no support in the evidence which clearly requires the inference that it was executed in pursuance of the contract. From that time forward Anton conducted the farm on tract A, and after the purchase of tract B, with the apparent permission of his father, cultivated and managed that tract, both tracts being used as one farm. The transaction appears to have been simply a substitution of Anton for his father in the management of the farm because of the latter's advancing years.

Joseph, Sr., died December 19, 1892, leaving surviving him four children, Joseph M. II, Ignatius, Mary K, Anton, and Anna, his widow. Anna continued to live on the farm until her death September 22, 1900.

Anton Walter died February 2, 1913, leaving surviving him six children, Rosa, Frank, Anton, Mary, Joe, and Otillie, and Mary, his widow. These are all living.

Joseph M. II died June 23, 1893, leaving surviving him four children, Fannie, Victor, George, Joseph III, and Clotilda, his widow, all defendants herein.

Upon the death of Joseph, Sr., title to the tract in question descended to his four children in equal shares, subject to the interest of Anna as widow, and upon the death of Joseph M. II, his one-fourth passed to his four children and Clotilda, his widow.

At the death of Joseph M. II in 1893, therefore, the record title was vested in Ignatius, one-fourth, Mary K, one-fourth, Anton, one-fourth, and the children of Joseph II, one-fourth, subject to the rights of the widows, which are not in controversy. The title has so remained up to the present time, except that the children of Anton succeeded to his interest February 2, 1913, four of whom, Rosa, Frank, Anton, and Mary, quitclaimed to Joe and Otillie, plaintiffs, May 10, 1913. This suit was brought January 2, 1924.

The action is brought against Ignatius and Mary K. and the four children of Joseph II and their respective wives and husbands, where married, and the claim of plaintiffs is that they and their ancestor, Anton Walter, have been in the actual, exclusive and adverse possession of the tract in controversy for more than ten years, and they pray that their title may be quieted as against the other defendants. Issue was joined by the filing of a joint answer and cross-petition praying for partition and an accounting of the rents and profits, to which plaintiffs filed a reply alleging that defendants were guilty of laches and other matters in the nature of estoppel, not necessary to be detailed at this point. The district court found for the plaintiffs and entered a decree quieting their title. Joseph III filed a separate motion for new trial, the others joining in a similar motion, which motions were overruled, and defendants appeal to this court.

As we view it, there is but one question to be determined, and that is whether or not the plaintiffs by the evidence have established an ouster of their cotenants so as to start the running of the statute of limitations.

It is well established that the possession by one cotenant of common property will be presumed to be friendly as regards his contenants, and that, before such possession can become adverse, notice by the tenant in possession that he claims title, or that his possession is hostile as against his cotenants, must be brought home to them in some plain and unequivocal manner. *Beitz v. Buendiger,* 144 Minn. 52. Until such notice is shown the law presumes that the possession is for the benefit of all the cotenants. 38 Cyc. 21. This notice need not be direct and positive, but may be inferred from acts of the tenant in possession, in hostility to the title of his cotenants, of such an open and notorious character as would put a man of ordinary prudence upon his guard. Acts of the tenant, however notorious, which are reasonably consistent with the existence of title in his cotenants are not sufficient, they must be hostile and of such a character as would put a reasonable man,

aware of his rights, upon inquiry. See *Carson v. Broady*, 56 Neb. 648; *Chase v. Lavelle*, 105 Neb. 796; *Keleher v. Kelly*, 89 Neb. 127; *Lambert v. Hemler*, 244 Ill. 254; *Schoonmaker v. Schoonmaker*, 154 Ia. 500; *Campbell v. Humphreys*, 202 Ia. 472; *Hudson v. Coe*, 79 Me. 83; *Patton v. Patton*, 197 Ky. 237. Land having descended to heirs, it is presumed that the possession and management thereof is for the benefit of all. *Stull v. Stull*, 197 Pa. St. 243.

With these principles in mind, we will now examine the evidence as preserved in the record.

The tract in question was not improved except by a fence enclosing it. Twenty-five or thirty acres were cultivated and the remainder used for hay and pasture. There never were any buildings, nor has any one ever lived upon the tract. It was farmed and controlled in connection with tract A as one farm by plaintiffs' ancestor Anton until his death in 1913. Several ditches were dug upon it for the purpose of draining the lower portions. After Anton's death the tract remained in the possession of his widow and children living on tract A and operated in the same manner as theretofore down to the present time. There is not a scintilla of evidence to warrant a finding that the possession of Anton was adverse to Joseph, Sr. In fact, this is not claimed by plaintiffs; nor do we find any evidence of any facts brought home to the knowledge of defendants which would put them upon notice of any hostile claim by Anton during his lifetime. The existence of the fence enclosing the property and the digging of the drainage ditches are both consistent with the existence of title in the cotenants and afford no inference of a hostile claim by the tenant in possession. It follows that the ouster, if any, must have taken place after Anton's death in 1913.

The plaintiffs rely upon the following facts and circumstances to show ouster: Anton Walter died testate leaving a will devising and bequeathing his property, real and personal, to four of his children, excluding plaintiffs, Joe and Otillie, who were not mentioned in any way. The

will disposed of real estate in Knox county, but made no disposition of the tracts A and B, which are in Dodge county. This failure to include any Dodge county property is attempted to be accounted for in an affidavit of Frank Dolezal, attorney for plaintiffs, recorded April 24, 1917, in which he says: "That the complications in said estate arose on account of the fact that the said deceased by conference with his family had worked out a plan of willing his property and had been mistakenly advised that there would have to be a separate will for his property in Dodge county and another separate will for his property in Knox county, and that deceased had made the will for the property in *Dodge* county, and before completing his will for the property in Knox county, he died, and the family desired to have his wishes carried out the same as if he had completed the will for this property in *Knox* county. It was for this reason that the agreement and stipulation and transfer of interest was made." It is evident that the words "Dodge" and "Knox" were inadvertently transposed as the will of the Knox county property was complete.

Ignatius was a witness to his brother's will, and on the trial was asked whether anything was said at the time the will was drawn about this 80 acres, and he answered, "Yes." "Q. What did you say? A. I served notice that he could not will anything that did not belong to him." Plaintiffs claim this answer shows conclusively that Anton was claiming the land in 1912. On cross-examination witness testified that this had reference to the *east* eighty. Frank Walter, Anton's son, testified that in 1913, shortly after Anton's death, he and Ignatius made an examination in the register of deed's office of Dodge county, and that, opening a record book which was handed to them, containing the record of the eighty in question, he said: "Here it is; it is in grandfather's name, and should be in your father's name." This was denied by Ignatius. Ignatius was named executor in Anton's will, but declined to serve and took no further part in the

settlement of Anton's estate beyond testifying as a witness to the will. The inventory in that estate included both tract A and tract B. Objections to the probate of the will were filed by Joe and Otillie March 4, 1913, because they were not mentioned in the will, and in order that the will might be probated an arrangement was entered into between the heirs of Anton that the personal property and the two tracts in Dodge county should be turned over to plaintiffs, with the results that the other children of Anton took the lands in Knox county under the will, and the quitclaim deed above referred to, dated May 10, 1913, was executed in pursuance of that arrangement. The widow was awarded a homestead interest in both tracts. This arrangement was made about May 10, 1913, the quitclaim deed to plaintiffs executed that date and recorded June 11, 1913. Inventory in the estate was filed December 6, 1913; final decree and discharge of administrator filed February 14, 1916; distribution of estate in Dodge county was based upon and in accordance with the arrangement between the heirs as appears from recitals of the decree. January 1, 1922, in reply to a letter from Joe, Ignatius wrote, saying: "A quitclaim is no good and some day you must go into the district court and have that deed corrected and that will cost money, too." Prior to this, in 1921, Joe had asked his uncle for a quitclaim deed and been refused. There was a claim, not now insisted upon in the briefs, that Anton had paid for the eighty in dispute. This letter may have referred to this claim—that title should have been made to Anton instead of Joseph, Sr. The evidence does not disclose a discussion of an adverse possession, either at the register of deeds' office or in connection with this letter. The letter to which it was an answer was not produced.

In 1893 Ignatius was administrator of his brother's (Joseph II) estate and did not include in his inventory the undivided one-fourth of the tract in Dodge county which he now claims his brother owned. February 14, 1916, Mary Walter, widow of Anton, quitclaimed to plaintiffs

tracts "A and B," reserving a homestead interest "to assure the carrying out of the understanding and agreement on which the last will and testament *after* deceased husband was probated."

The quitclaim deed of the four other children of Joseph II to plaintiffs covered both tracts and contained the following recital: "This is to quitclaim the apparent interest of grantors as heirs at law of Anton Walter, deceased, to grantees who are also heirs at law of said deceased to effect disposition agreed on." Anton paid the taxes on tract B which was assessed in the name of Joseph, Sr., until Anton's death, after which it was assessed to Joseph Walter et al. After Anton's death his widow paid the taxes until "a few years back"—"then I paid them, I always paid the taxes for her," Joe Walter testified.

It being conceded that it is incumbent upon the plaintiffs to prove an ouster of their cotenants, what is there in all this testimony (leaving out of view for the present the effect to be given the fact of such possession and occupancy as plaintiffs have shown) which tends in any manner to establish an ouster? There is no evidence of any positive notice to defendants that plaintiffs claimed the title adversely to them until the year 1921, when Ignatius was asked for a quitclaim deed, about five years before the beginning of the suit. The statement by Ignatius to his brother that he could not will anything that did not belong to him, according to Ignatius, had reference to the east eighty, which he says his father was about to put into the will. This eighty had been conveyed by the father to Anton in 1880. The incident referred to by Frank Walter at the register of deeds' office, when Ignatius is claimed to have said with reference to the eighty in question, "It is in grandfather's name, and should be in your father's name," might be evidence against Ignatius, but not against the other defendants. Ignatius denies this incident *in toto*. The same may be said of the fact that Ignatius, as administrator of the estate of Joseph II, in Knox county, failed to include in the inventory the one-

fourth interest which he now claims Joseph II had in the land in controversy. The arrangement made between the children of Anton Walter, upon objection being made to the probate of Anton's will, was one in which the defendants had no interest. They were not heirs or devisees of Anton, and the only connection Ignatius had with the matter was as a witness to the will, he having declined to act as executor. It is not shown nor claimed that any of these defendants were parties to that arrangement, nor, for that matter, had any knowledge of it. The fact that the land in question was included in the inventory of Anton's estate does not bind the defendants, but is explained upon the record itself. The arrangement was made in 1913, the quitclaim deed to plaintiffs being executed May 10 and recorded June 11 of that year. The inventory was not filed until December 6 following, and the decree of distribution recites that it was made in accordance with the stipulation and arrangement of the parties. The inventory, the same as the decree, was made after and in conformity with the arrangement between the heirs of Anton. It is argued that the recording of the quitclaim deed dated May 10, 1913, was notice to defendants of the hostile claim of the plaintiffs; but this is incorrect for several reasons. The deed included both tracts, A and B, and purported to convey only "the apparent interest of grantors as heirs at law of Anton Walter, deceased." What was the *apparent* interest of grantors? It was their two-thirds interest in the one-fourth interest which their ancestor Anton received in tract B as one of the four children of Joseph, Sr. The title to the land was in Joseph, Sr., and upon his death the apparent title was in his four children. The deed does not purport to convey the entire tracts, but only their apparent interest, which is as above stated. Clearly this was no notice to defendants of a hostile claim by plaintiffs, because it only dealt with an interest which plaintiffs are conceded to hold, to wit, one-fourth. It also conveyed their apparent interest in tract A, as heirs of Anton. The decree and proceedings in

Anton's estate were not notice to defendants, because they had no interest in that estate.

The deed of Mary Walter to plaintiffs cannot be considered as notice because it was dated February 14, 1916, and, therefore, within the ten year period.

We are, therefore, brought to the question whether or not the possession of plaintiffs and their ancestor was of such a notorious and exclusive character as to amount to an ouster. What was the nature of this possession and in whom was it vested? It must be borne in mind that we are not concerned with the possession of tract A beyond the fact that it was the home place and had always been farmed in connection with the land in dispute as one tract. At the death of Joseph, Sr., the title and ownership of A was in Anton, while that of B was in Joseph, Sr. Tract A was the homestead of Joseph and his wife, Anna, by virtue of the reservation in their deed to Anton; and tract B was a part of the home farm of Joseph, Sr., and was subject to the homestead right of his widow, Anna, who was entitled to the possession thereof during her life. It would seem, therefore, that the possession of tract B, as well as tract A, would be referable to Anna's title as widow, and not to plaintiffs and other children of Anton who lived with her and assisted her in carrying on the farm. She died in 1900, after which event, Anton became the full owner of tract A and of one-fourth of tract B and continued in possession of both tracts until his death in 1913, since which time his widow and heirs have remained in possession making no claim brought home to the notice of the defendants of any hostility to their interests as heirs of Joseph, Sr., along with plaintiffs' ancestor, Anton, until 1921. There were no buildings upon tract B, no one has ever lived upon it, and the only improvements placed thereon by plaintiffs or their ancestor were the digging of certain ditches to drain the lower portions of the tract, which was done by Joe some time after 1914.

We find nothing in the character of this possession calculated to give notice of a hostile claim by plaintiffs. The

fence existed before the death of Joseph, Sr., and the digging of ditches was not an act of such notoriety as to furnish such notice. It was only such an act as would be done by an ordinary tenant seeking to make profitable use of the land. Morever, they were dug within the ten year period.

Plaintiffs confidently rely upon the case of *Lund v. Nelson*, 89 Neb. 449, and quote the syllabus thereof in the following language: "Where one tenant in common enters upon the whole estate, improves it, takes the profits, pays all the taxes, makes it his home, and claims the whole for more than the period of the statute of limitations, an actual ouster should be presumed although not otherwise proved."

As applied to the facts of that case the statement of the law is doubtless correct, but what were the facts to which it was applied? Plaintiffs' ancestor had purchased in 1890 from the defendant Renstrom a twenty-four twenty-fifths interest in the land in question, had taken possession, built buildings, made other extensive improvements, and made the same his home up to the time of his death, after which his family remained in possession, constructing buildings and farming it as owners, paying the taxes and receiving the income; the names of the original owners of the one twenty-fifth interest were unknown, and the action was against the original grantor, Renstrom. It was said in a concurring opinion by Root, J., that the appellant Renstrom "had no title to or interest in this land, is not a tenant in common, and the question of adverse possession does not arise in the case." It thus appears that there was a difference of opinion among the judges as to the existence of any title in the defendants, but the case was decided upon the proposition that the general rule, that the possession of one tenant in common is the possession of all, was not applicable to that case, and that ouster would be presumed from the state of facts proved. We are not disposed to give effect to so general a statement of the rule beyond the facts of the case in which it was announced.

In the instant case the only improvements made were digging some ditches, but these were dug within ten years prior to commencement of this suit. The possession was in connection with the east eighty. As above stated, this possession after death of Joseph, Sr., might be referable to Anna, his widow, until her death in 1900. So far as Anton and his heirs are concerned, the only acts claimed to be hostile are the payment of taxes, farming the tract and retaining the rents and profits without objection for a period of 31 years. The possssion was by fence, not erected by claimants, the cultivation of about 30 acres, and the use of the remainder for pasture. While these facts might be sufficient to establish adverse possession where the entry was tortious and wrongful, we think they are not enough where entry was presumably permissive and friendly. In the latter case—"Something must affirmatively appear that indicates a purpose to assert title adverse to the cotenants, knowledge of which is chargeable to the other cotenants, before an ouster can be held to have taken place, and the statute of limitations started, on which title by adverse possession can rest." *Campbell v. Humphreys,* 202 Ia. 472, quoting from *Clarke v. Dirks,* 178 Ia. 335. Acts which might be held to constitute a disseisin if done by a stranger may not have such effect if done by one tenant in common against the other tenant. *Hudson v. Coe,* 79 Me. 83; *Warfield v. Lindell,* 30 Mo. 272. Mere possession, receipt of rents and profits and payment of taxes are not sufficient to start the statute of limitations, because the possession was rightful and receipt of the rents and profits made it the duty of the cotenant in possession to pay the taxes for the benefit of all. *Long v. Morrison,* 251 Ill. 143; *Blackaby v. Blackaby,* 185 Ill. 94; *Smith v. Libby,* 122 Me. 156; *Warfield v. Lindell,* 30 Mo. 272; *Schoonmaker v. Schoonmaker,* 154 Ia. 500.

Finally, it is contended that defendants have been guilty of laches in failing to claim their rights as cotenants. We think the doctrine of laches has no application here.

Until notice that their rights were threatened is brought home to them, cotenants are not required to take affirmative action, but may rest secure that the possession of their cotenant is their possession and that payment of taxes is for the benefit of all. "Where one joint tenant is in exclusive possession under the common title, a cotenant cannot lose his right by mere laches in failing to demand admission into joint possession or share of the rents and profits. There must be an ouster operating to give title under the statute of limitations." *Reed v. Bachman,* 61 W. Va. 452. The burden of affirmative action is upon the party in possession, if he wishes to convert a peaceful and lawful possession into a hostile holding. Plaintiffs cite *Butler v. Peterson,* 79 Neb. 715, and *Hawley v. Von Lanken,* 75 Neb. 597. They are not controlling. In both cases the doctrine was invoked against the plaintiff, and in both it appeared that defendants were prejudiced by the delay. In *Hawley v. Von Lanken* the rule was stated: "In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action and whether a reasonable excuse is offered for the delay." In the present case no such prejudice appears. The cost of the ditches and taxes paid are a lien upon the lands and may be fully recovered upon an accounting between the parties. And, as heretofore stated, defendants were entitled to rely upon their legal rights as cotenants of plaintiffs and their ancestor, thus furnishing a reasonable excuse for not bringing suit. In this connection it is argued that plaintiffs gave up valuable rights in the Knox county lands in reliance upon the undisturbed possession by Anton of the lands in dispute. The plaintiffs received upon the settlement all the personal estate of Anton in Dodge county and the east eighty. The evidence furnishes no clue as to the comparative values of the estate in Knox and Dodge counties, respectively. But for the "family arrangement" in Anton's estate the interest of plaintiffs in the east eighty would have been reduced to one-third, and their interest in Knox county es-

tate would have been one-third, after the payment of $3,000 of legacies and a $3,000 mortgage. No prejudice is shown. It is said in 30 Cyc. 190, that, until a "prescriptive title is created, neither laches nor the statute of limitations will prevent the maintenance of proceedings for partition" —citing cases from twelve states. The rule seems reasonable, for at any time before the statute of limitations is complete action may be brought against the cotenant.

It follows that the opinion by the commission must be set aside and the judgment of the district court reversed, and the cause remanded, with instructions to decree partition and an accounting as prayed in the cross-petition.

REVERSED.

HYACINTHE W. STRATTON, APPELLEE, V. SERVICE LIFE INSURANCE COMPANY, APPELLANT.

FILED NOVEMBER 28, 1928. No. 26140.

1. **Insurance: PLEADING.** Where, in an action on a life insurance policy, the petition alleged payment of premiums and the answer admitted the issuance of the policy, death of assured and proofs of loss and denied all other allegations not expressly admitted, *held*, that payment of premiums was not put in issue, in the absence of an allegation that the policy had lapsed.
2. ———: ———. Where the issuance of a policy of insurance is admitted, and the insurer relies upon a breach of a condition thereof as a defense, the facts showing such breach must be specially pleaded in the answer.
3. ———: POLICY: CONSTRUCTION. A clause in an insurance policy that it should be incontestable after a specified time, except as to certain matters stated, operates to exclude all defenses not within the exception, provided the limitation of time be reasonable.
4. ———: ———: FRAUD: LIMITATIONS. A limitation of one year within which an insurance policy may be contested for fraud in its procurement is a reasonable one.
5. ———: ———: ———: ———. Such a limitation is valid though the statutory provision was two years, as it was for the protection of both parties to the contract, and it was within their competence to provide a shorter period; no question of public policy is here involved.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Allen & Requartte, for appellant.

Slama & Donato, contra.

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

The action is brought to recover upon an insurance policy issued by defendant to Lee H. Stratton, by Hyacinthe W. Stratton, widow and beneficiary. The petition alleged the issuance and delivery of the policy and payment of the first year's premium, $195.75, and that assured died January 17, 1927. It was then alleged that on the 3d day of March, 1926, said Lee H. Stratton paid the annual premium on said policy, and that all conditions of the contract had been performed; that proofs of loss had been made, but that defendant refused to pay. A copy of the policy and application therefor, which was made a part of the contract, was attached to the petition and made a part thereof.

The defendant answered, admitting the issuance of the policy, the death of the insured, proofs of loss and rejection of the claim, and made the following denial: "De fendant denies each and every allegation and averment in plaintiff's petition except as herein expressly admitted to be true." The answer then proceeded, under the heading "Defendant's Affirmative Defense," and alleged that the policy was procured by fraud, in that insured, in his written application, made a number of statements as to his present and previous condition of health which he knew to be false, upon which defendant relied in issuing the policy. The answer then contained the following allegations:

"12. That plaintiff had paid in his lifetime on said policy premiums in the sum of $336.55; that said sum with

interest has been tendered to the beneficiary and refused and defendant again tenders said amount into court."

"That by reason of the statements, representations and warranties hereinbefore set forth, the defendant was and is totally exempt from any and all liability to the beneficiary named in the said policy sued on, on account of the death of said Lee H. Stratton, which was and is directly traceable to the condition of his health at and prior to the time the policy herein was issued."

The prayer was as follows:

"Wherefore defendant prays that plaintiff's petition may be dismissed, and that it may have judgment against the plaintiff for its costs herein, and that it be determined by the court that the defendant is exempt from liability to said beneficiary under said policy herein sued on."

The plaintiff thereupon filed a motion for judgment in her favor on the pleadings, on the ground that the answer failed to state a defense, which motion was sustained by the court and judgment rendered for the full amount of the policy with interest, $5,145, and $350 attorney's fee. Defendant excepted and brings the cause to this court, making four assignments of error, but which present only two questions for our determination:

(1) That by the general denial of the answer, the allegation of the petition that the premium for the second year had been paid was put in issue and that the court therefore erred in sustaining the motion. We think this assignment is not well taken. If the answer had consisted merely of a general denial, thereby putting in issue the existence of the policy, the position of defendant would probably be correct; but where the existence of the policy at one time is admitted, and defendant seeks to avoid liability by the breach of some condition in the policy thereafter occurring, the defense is in the nature of a forfeiture, and it is incumbent upon the defendant to specially plead the condition and breach. *Sharpe v. Grand Lodge, A. O. U. W.*, 108 Neb. 193; *Farmers & Merchants Ins. Co. v. Newman*, 58 Neb. 504; *World Mutual Benefit Ass'n v. Worthing*, 59

Neb. 587; *Pickett v. Fidelity & Casualty Co.*, 60 S. Car. 477; *Helvetia Swiss Fire Ins. Co. v. Allis Co.*, 11 Colo. App. 264; *National Mutual Fire Ins. Co. v. Sprague*, 40 Colo. 344; *Harris v. Security Life Ins. Co.*, 248 Mo. 304; *Globe Mutual Life Ins. Ass'n v. March*, 118 Ill. App. 261. Where the allegation was that the policy was issued for a valuable consideration and the answer expressly denied this allegation, it was held this "did not tender an issue relative to the premium note being unpaid, or whether the policy was invalidated by reason of such nonpayment." "Where the insurer relies upon a stipulation in a policy to defeat a recovery it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451. Where petition alleged performance of all conditions and answer denied the same but did not specify any breaches, it was held insufficient. *Pickett v. Fidelity & Casualty Co.*, 60 S. Car. 477. The defense sought to be interposed by the general denial is that, by reason of failure to pay the full second year premium, the policy had lapsed, and was no longer in force. This was an affirmative defense depending upon a breach of some condition of the policy and should have been specially pleaded. Again, it is very doubtful, applying the rule that the allegations are to be taken most strongly against the pleader, whether payment of the premium is denied. There are no facts pleaded or lapse alleged; the answer simply alleges the payment of $336.55 in connection with a tender of that sum to the beneficiary, and sets forth as the only reason why it should be exempt from liability the falsity of the statements and warranties in the application; this without any suggestion as to the insufficiency of that amount.

But there is another reason why defendant may not insist upon this assignment of error in this court, from the fact that this particular question was not argued and presented to the district court upon argument of the motion for judgment. This fact is stated in brief of appellee, and not denied by appellant, except by insistence that the question was presented by the pleadings. The statement

in the brief, however, is borne out by the opinion of the district judge set out in the brief of appellee, in which opinion no reference is made to the question under discussion. It is too well settled in this jurisdiction to require citation of authorities that upon appeal this court will not consider questions not presented to the lower court, and that the issues upon which the cause was there tried are binding upon the parties upon appeal to this court. *Foster v. City of Lincoln,* 107 Neb. 404.

(2) That the answer set up a good defense on account of the fraud in the inception of the policy. In compliance with the requirements of the statute of Nebraska, section 7837, Comp. St. 1922, as amended by chapter 121, Laws 1925, the policy in question contained the following provision:

"This policy and the application therefor constitute the entire contract between the insured and the company and shall be incontestable after one year from date hereof, except for the nonpayment of premiums. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid the policy unless it is contained in the written application therefor, a copy of which is attached hereto. If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age."

It is argued by defendant that by the second sentence of said clause the right is reserved to the insurance company, at any time, to defend on the ground that the policy had been fraudulently obtained. We think not. The language of this clause is not precisely that of the statute which reads as follows:

"No policy of life or endowment insurance, except policies of industrial insurance or where the premiums are payable monthly or oftener, shall be issued or delivered in this state unless it contains in substance the following provisions: * * *

"4. A provision that all statements made by the insured

shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued; and

"5. A provision that the policy shall be incontestable after * * * two years from its date, except for nonpayment of premiums, and except for violations of the conditions of the policy relating to naval and military service in time of war." Laws 1925, ch. 121.

It will be noted that the statute required that the policy be incontestable after two years from its date, whereas the policy makes it one year. This difference will be referred to later. If there is any difference in the legal effect of the provisions of the statute and those of the policy, the defendant would be in no position to take advantage thereof, but is bound by the terms of its contract as made, and it does not attempt to make any distinction. But defendant argues that paragraph 4, above quoted, reserves the defense of fraud in the procurement of the policy. To adopt this construction would require the insertion in paragraph 5 of an additional exception, which contains but two, (a) nonpayment of premiums, and (b) violation of conditions relating to naval and military service in time of war. The two sections must be construed together in order that both may stand. If we adopt the construction insisted upon by defendant we enlarge the specific exceptions of paragraph 5. This we cannot do. Section 4 merely provides that all statements and representations of assured shall not be considered warranties, in the absence of fraud, while section 5 provides that the policy shall be incontestable after two years, except as to certain matters, not including fraud. We think the two year limitation applies to every other defense than those excepted or otherwise provided for and fixes a period after which those other defenses shall not be available. The provision as to fraud is in full force during the limitation of one year, the effect of which is to require the insurer to make such

investigation as he desires with reference thereto, and take proper steps to cancel or rescind the policy within the period of limitation, failing which the policy will be incontestable on that ground. *Metropolitan Life Ins. Co. v. Peeler,* 71 Okla. 238. By this construction all provisions of the statute are reconciled and given force.

It is not contended that such a provision of incontestability is beyond the competence of the legislature; in fact, similar provisions have been uniformly sustained by the courts of many different states. *Metropolitan Life Ins. Co. v. Peeler, supra,* where many of the cases are cited; also reported in 6 A. L. R. 441, containing a valuable annotation at pages 453-456. See, also, 14 R. C. L. 1199, sec. 380, where it is said: "The general rule is that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract precludes every defense to the policy other than the defenses excepted in the provision itself, including false answers in the application, and even fraud where the time fixed by the contract is not unreasonably short"—citing cases.

Defendant cites *Welch v. Union Central Life Ins. Co.,* 108 Ia. 224, as parallel to the present case, but there was no limitation in the policy there considered within which the defense of fraud could be made. Moreover, the contract provided that the facts stated in the application are warranted to be true, and a subsequent clause provided that, "except as hereinbefore provided, the policy shall be incontestable for any cause except misstatement of age," and it was held that the defense of fraud was thereby preserved. The case recognizes the general rule that, where the contract provided it should be incontestable after a specified time, the defense of fraud would be thereby shut out, saying: "Such stipulations did not condone the fraud, but limited the insurer to a time within which it might assert the fraud as against the contract. In these cases the right to defend on the ground of fraud within the time

agreed upon is recognized"—citing *Wright v. Mutual Benefit Ass'n*, 43 Hun (N. Y.) 61; *Massachusetts Benefit Life Ass'n v. Robinson*, 104 Ga. 256. Cases cited by defendant to the effect that fraud is not excluded by an incontestable clause operating from the date of the policy have no application here; such cases are *Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555, and *New York Life Ins. Co. v. Weaver's Adm'r.*, 114 Ky. 195.

The voluntary reduction by defendant from two years to one was within the competency of the parties to the contract, and has been held analogous to those cases where the doctrine is announced that the parties may contract for a period of limitations within which action may be brought less than that provided by general statute. *Southern Union Life Ins. Co. v. White*, 188 S. W. (Tex. Civ. App.) 266; *Metropolitan Life Ins. Co. v. Peeler*, 71 Okla. 238; *Citizens Life Ins. Co. v. McClure*, 138 Ky. 138.

The construction we have adopted would not require us to hold, as suggested by defendant, that defense for misstatement of age could only be made in one year, for the reason that the contract specifically provides for that situation.

In conclusion, we hold that the period of one year is a reasonable limitation for contesting the policy for fraud, that the defense that the policy lapsed for nonpayment of premium is not presented by the answer, and that the motion for judgment on the pleadings was properly sustained.

AFFIRMED.

MONA M. WILSON V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1928. No. 26553.

1. **Homicide: INFORMATION.** Information set out at length in the opinion examined, and *held* to be sufficient to charge the crime of murder in the first degree "by administering poison" under section 9544, Comp. St. 1922.
2. **———: PLEA OF GUILT: PROVINCE OF JURY.** A defendant charged with first degree murder "by administering poison" is,

upon conviction, subject to the death penalty or to be imprisoned in the penitentiary during life, "in the discretion of the jury," and a plea of guilty to such a charge vests the power exclusively with a jury to determine what the penalty shall be. A court, therefore, in attempting to pronounce and impose sentence to the plea of guilty of a defendant to such a charge pronounces a legal nullity.

3. **Criminal Law**: SENTENCE: JURISDICTION. "Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void." *In re McVey*, 50 Neb. 481.

4. ———: VOID SENTENCE. Where the sentence of the trial court in a criminal case is void for want of jurisdiction, it may be brought into question and raised for the first time on appeal in this court without the question first having been presented to the trial court in a motion for a new trial.

ERROR to the district court for Sheridan county: EARL L. MEYER, JUDGE. *Reversed.*

Charles E. Matson and *R. L. Wilhite*, for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

STALMASTER, District Judge.

This was a criminal prosecution against the plaintiff in error, who will hereafter be called the defendant, commenced by the county attorney for Sheridan county, Nebraska. The information filed was very obviously drawn under section 9544, Comp. St. 1922, and was intended to charge the defendant with murder in the first degree by administering poison.

The information was filed July 22, 1927, and on the same day the defendant pleaded guilty and was sentenced by the court to a term of 30 years in the state penitentiary. It is nowhere apparent from the record that a jury was impaneled and sworn at any stage of the proceedings, and

we must, therefore, assume that a jury was never called to consider or hear the case.

The defendant filed her petition in error in this court, setting forth seven assignments of error, but an examination of the transcript discloses that only the statutory ground of newly discovered evidence was assigned in the lower court as ground for a new trial. The motion for a new trial was filed August 27, 1927, and on the same day a motion in arrest of judgment was also filed, the reason therein set out being that "the facts stated in the information filed herein do not constitute an offense under the statutes of the state of Nebraska."

On January 26, 1928, both of these motions were overruled by the trial court, after which the petition in error was duly filed in this court.

In the brief filed by the defendant, twelve distinct propositions of law are presented for consideration. An examination of the transcript, however, discloses that only propositions numbered one to ten are necessary to the consideration of the matters presented for review.

The first proposition urged is that only the court *and jury* may determine the penalty to be imposed in first degree murder, and that a defendant charged with that offense cannot waive the statutory requirement of a jury to fix the penalty. The second is that, since the information does not state an offense under the laws of this state, the motion in arrest of judgment should have been sustained under the provisions of section 10159, Comp. St. 1922.

We shall consider the last-named proposition first and the first-named last, because of the manifest precedence the latter has over the former.

1. Without reciting the formal introduction, the information filed charged the defendant did—

"On the 17th day of July, A. D. 1927, in the county of Sheridan and state of Nebraska, aforesaid, then and there being, did then and there unlawfully, purposely, feloniously and of deliberate and premeditated malice, one Olive E.

Loomis, with poison, to kill and murder in and upon the said Olive E. Loomis, then and there being, wilfully, feloniously and of her deliberate and premeditated malice, did make an assault, and a large quantity, to wit, two grains' weight of a certain deadly poison called strychnine, then and there wilfully, feloniously and of her malice aforethought did give and administer unto the said Olive E. Loomis, with intent that the said Olive E. Loomis should take and swallow the said strychnine down into her body, she the said Mona M. Wilson, then and there well knowing the said strychnine to be a deadly poison, and the said Olive E. Loomis, the said strychnine, so given and administered unto her by the said Mona M. Wilson, as aforesaid, did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said strychnine into her body, she, the said Olive E. Loomis, then and there became and was mortally sick and distempered in her body, and of the said mortal sickness and distemper on the said 17th day of July, A. D. 1927, she the said Olive E. Loomis, in the county and state aforesaid, of the said mortal sickness and distemper died."

It then concludes with this final statement:

"And so the said county attorney, aforesaid, on oath doth say that the said Mona M. Wilson did murder her, the said Olive E. Loomis, as aforesaid, unlawfully, purposely, feloniously, and of her deliberate and premeditated malice, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

Since the concluding part of the information last quoted is nothing more than a mere conclusion arising from the facts previously stated and cannot cure any defects in the premises on which it assumes to be predicated, we must leave it wholly out of consideration in determining the sufficiency of the information. *Schaffer v. State*, 22 Neb. 557.

The material parts of section 9544, Comp. St. 1922, under which the information was drawn reads:

"Whoever shall purposely and of deliberate and premeditated malice * * * by administering poison, or causing the same to be done, kill another, * * * every person so offending shall be guilty of murder in the first degree."

There is much that might have been left out of the information as drawn without affecting the essential parts stated therein. This court has held that, where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected. *Hase v. State*, 74 Neb. 493.

The information reduced to the simplest form merely states that the defendant unlawfully, purposely, feloniously and of deliberate and premeditated malice to kill and murder one Loomis with poison, did give and administer a deadly poison called strychnine to the said Loomis, knowing it to be a deadly poison, and that Loomis did take the poison so given and administered, by reason of which Loomis died on July 17, 1927.

We think this substantially recites all of the elements of the crime under section 9544, which states that whoever purposely and of deliberate and premeditated malice by administering poison kills another is guilty of murder in the first degree.

In charging the commission of an offense in an indictment, it is not necessary that the exact words of the statute be used, provided that the words employed are the equivalents in meaning of those contained in the statute. *Hase v. State*, 74 Neb. 493.

We think it not improper to suggest that the style employed for stating the offense is rather involved, but on the whole it is sufficient to meet the requirements of the statute under which it was drawn. The motion in arrest of judgment was therefore properly overruled.

2. The defendant pleaded guilty to the information set out heretofore, and it is clear that no plea could be received to anything less than first degree murder under the information before the court. Section 9544 heretofore quoted also provides:

"Every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, *in the discretion of the jury.*"

Upon the plea of guilty by the defendant, the court without the aid or intervention of a jury sentenced her to 30 years in the state penitentiary. It may be observed that, if the court did have the right to pronounce sentence, it could only do so by imposing the death penalty or imprison the defendant in the penitentiary during life.

It seems to us, however, that the court undertook to do that which is exclusively vested "in the discretion of the jury." What the penalty should be for murder in the first degree is for the jury to determine. It is then but a mere formality for the court to pronounce a sentence the determination of which the law vests with the jury exclusively.

The law of Indiana governing capital cases is almost identical with that of Nebraska. The same question seems to have been presented in *Wartner v. State,* 102 Ind. 51. In this case the court received a plea of guilty to a charge of murder in the first degree and fixed the penalty at death. Reversing the action of the trial court, the supreme court of Indiana said:

"In the case in hand, the record fails to show whether or not the appellant waived, or attempted to waive, his constitutional right to a trial by jury; but, as such a waiver is not authorized by statute in this case, the silence of the record on this point is wholly immaterial. Nor is it material that the record fails to show any objection or exception, by or on behalf of the appellant, to the trial of his case by the court or to any of the proceedings had therein. It is shown by the record that appellant's case is a capital

case, and that the court, without the intervention of a jury, tried his case, found him guilty as charged, and adjudged that he suffer the penalty of death. This the court was not authorized to do, nor was the appellant authorized to consent thereto by any law of this state. *Koerner v. State*, 96 Ind. 243. After the appellant's plea of guilty, the proceedings and judgment of the court are erroneous, and errors of so grave a character that he has the right to insist upon them here as affording substantial grounds for the reversal of the judgment. The law of his case as declared in section 1904, Rev. St. 1881, is that for the felony, whereof he says he is guilty, he 'shall suffer death or be imprisoned in the state prison during life, *in the discretion of the jury.*' In assessing his punishment the record shows that the court usurped and exercised a discretion which the statute has conferred upon the jury, and not upon the court. Under the statute the appellant had and has the right to have a jury say, in their discretion, which one of the two punishments he shall suffer."

We have heretofore written approvingly that, where there is a plea of guilty in a homicide case and the court determines the crime to be first degree murder, the proper procedure then is to submit to a jury the question of the penalty to be imposed. *Cole v. State*, 105 Neb. 371. It is our opinion, therefore, that the court invaded the province of the jury in fixing the penalty, the right so to do being vested exclusively with the jury.

3. We have held on another occasion: "Jurisdiction to pronounce a particular sentence imposed is as essential as jurisdiction of the person and subject-matter. If the first does not exist the sentence is void." *In re McVey*, 50 Neb. 481.

4. It is argued by the state, however, that the attack upon the right of the trial court to pronounce the sentence and the validity of it should have been first made in the motion for a new trial, and not having done so, the defendant may not now urge it for the first time in this court. A number of authorities are cited in the state's brief to

sustain the proposition, with which there can be no dispute, that errors complained of to be available on appeal must be set out in the motion for a new trial. We believe, however, that the situation in hand is without the rule contended for.

The trial court having no authority or power to fix the penalty could not legally pronounce it upon the defendant, and its attempt to do so was a nullity and without legal force and effect. The complaint to be made, therefore, is not that a mere error has been committed in the proceedings before the lower court. It is rather that the court was without jurisdiction to proceed at all as it did.

Where the court pronounces a sentence upon a defendant in a criminal case which it has no jurisdiction to fix or determine, objections to the exercise of such jurisdiction by the trial court may be raised for the first time on appeal to this court without first having presented the question before the trial court in a motion for a new trial. *State v. Swikert,* 65 Or. 286; *Johnson v. State,* 141 Ala. 7; *Waters v. Commonwealth,* 171 Ky. 457; *Monroe v. State,* 103 Miss. 759; *Rodgers v. City of Hattiesburg,* 99 Miss. 639. See, also, 17 C. J. 67, sec. 3334, and cases cited in note 27.

The transcript shows that the defendant was given a preliminary hearing in the county court on July 22, 1927; that a few hours later she was given a hearing upon the information in question in the district court, where she pleaded guilty; that on July 24, 1927, she was committed to the penitentiary and began serving her sentence. From an examination of the record we deem it proper to instruct the court to permit the defendant, if so advised, to withdraw her plea of guilty at any subsequent hearing.

For the reasons given, the judgment rendered in the district court is set aside and the cause is remanded.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1929.

ELSIE BENNER, APPELLEE, V. EVANS LAUNDRY COMPANY, APPELLANT.

FILED JANUARY 4, 1929. No. 26180.

1. **Master and Servant: INJURY TO MINOR EMPLOYEE: ACTION AT COMMON LAW.** A minor under 16 and over 14, employed in a laundry and injured while working at a laundry mangle, may maintain an action at common law for damages against the employer who has failed to procure the employment certificate prescribed by section 7670, Comp. St. 1922.
2. ———: ———: ———. The law does not compel such a minor in such circumstances to be classified, under section 3038, Comp. St. 1922, among those in the service of an employer as "including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this Code shall have the same power of contracting and electing as adult employees," and hence does not require such minors to rely on the compensation act for damages.
3. ———: ———: FAILURE TO PROCURE EMPLOYMENT CERTIFICATE. The main purpose of requiring the employment certificate is educational, though the health and physical fitness is an element to be considered in issuing it; but failure of an employer of a child under 16 and over 14 to secure the employment certificate prescribed by section 7670, Comp. St. 1929, cannot be said to be the proximate cause of an injury to the child; evidence of such failure to procure the certificate is material only for the purpose of sustaining the right to bring an action at common law rather than under the compensation act.

APPEAL from the district court for Lancaster county: MASON WHEELER, JUDGE. *Reversed.*

H. W. Baird and *James W. Kinsinger,* for appellant.

Wilmer B. Comstock, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOSS, C. J.

Elsie Benner, born February 20, 1911, sued the Evans Laundry Company for damages for an injury to her hand suffered in a mangle on September 3, 1926, while employed by the defendant in its laundry. From a verdict and judgment of $8,000 in her favor the defendant appealed.

The plaintiff was between 15 and 16 years old when she received the injury. The defendant had not procured the employment certificate required when a minor over 14 and under 16 years of age is employed in a laundry. Comp. St. 1922, sec. 7670. In the instructions to the jury the court limited the functions of the jury to the ascertainment of damages. The defendant assigns error in overruling a special demurrer setting up that the case was one for the workmen's compensation court rather than at common law and error in overruling a general demurrer to the petition; and assigns errors in the giving and refusal of instructions, and that the verdict was excessive.

The petition was framed under the common law and alleged that plaintiff, a minor of 15, was employed to work in a laundry without the permit required by section 7670, and in a place of danger to life and limb, in violation of section 7681; and that the defendant, in violation of sections 7690, 7691, and 7692, negligently and unlawfully failed to provide guards, boxes and screens to protect plaintiff from the laundry mangle at which she was required to work and permitted the appliances furnished to become broken, ineffective and out of repair. The special demurrer interposed by the defendant raised the issue that the petition did not set forth a cause of action at common law, but a right to proceed under the workmen's compensation law, in which the district court had no jurisdiction except on appeal. When the special demurrer was over-

ruled the defendant filed its general demurrer, which was likewise overruled. It thereupon answered, preserving its demurrer, denying the allegations of the petition, and alleging that the injury to the plaintiff, if any, was due to her negligence and carelessness.

The precise question involved in this feature of the case relating to the exclusive remedy under the compensation law has not been passed on by this court. The defendant cites *Navracel v. Cudahy Packing Co.*, 109 Neb. 506, as authority for the propositions that, where an employee has not rejected the compensation law, its remedies are exclusive, and that this rule is applicable to an employee who is a minor of an age when he is "legally permitted to work under the laws of the state," to quote from section 3038, Comp. St. 1922, from the definition including certain minors under the classification of employees in the compensation act. But Navracel was 19 years of age, was clearly of an age when he could lawfully be permitted to work without any special permit or license, and was held in that case to have elected to come under the compensation act by his failure to reject it formally. Indeed, in the progress of the argument in the opinion in the *Navracel* case, the court cited a case typical of those holding that, under statutes like ours, in such an occupation, minors under 16 are not "legally permitted to work" and so cannot be presumed to have submitted themselves to the provisions of the compensation act. The case to which we refer is *New Albany Box & Basket Co., v. Davidson*, 189 Ind. 57. The syllabus in that case reads as follows:

"The employment of a boy fifteen years of age to operate a wood joiner in violation of section 8022e, Burns 1914, Acts 1911, p. 511, and without the affidavit as to age, required by sections 8022, 8038, Burns 1914, Acts 1899, p. 231, being illegal and punishable as a misdemeanor under the statute, is not embraced within the provisions of the workmen's compensation act; and hence the latter act is not a bar to a common-law action for damages for injuries suffered in such employment."

Several cases are reviewed at length and others are cited by the Indiana court supporting the principle announced in the opinion.

In *Messmer v. Industrial Board,* 282 Ill. 562, the supreme court of Illinois reversed a compensation award in favor of the claimant, who was a minor between 14 and 16 and who might have been legally employed but for the fact that he had not secured the necessary permit to work. In *Taglinette v. Sydney Worsted Co.,* 42 R. I. 133, where the compensation act provided that "a minor working at an age legally permitted under the laws of this state shall be deemed *sui juris* for the purpose of this act," and where another statute prohibited any child between 14 and 16 from being permitted to work in any factory or manufacturing establishment, unless the firm employing him "has in its possession an age and employment certificate, given by or under the direction of the school committee," it was held that a minor over 14 years was not, simply because of his age, legally an employee.

Operation under workmen's compensation is a matter not of compulsion but election. The provisions against employing minors penalize employers and not minors. The employer should not be permitted to use them as a shield for himself and as a sword for the child. *Western Union Telegraph Co. v. Ausbrooks,* 148 Tenn. 615.

Without going further into a review of the cases, it may confidently be said that the great weight of authority in the review of statutes and situations like that now before us constrains us to hold that a minor under 16 and over 14 employed in a laundry and injured while working at a laundry mangle may maintain an action at common law for damages against the employer who has failed to procure the employment certificate prescribed by section 7670, Comp. St. 1922. The law does not compel such a minor in such circumstances to be classified, under section 3038 Comp. St. 1922, among those in the service of an employer as "including minors who are legally permitted to work under the laws of the state, who for the purpose of making

election of remedies under this Code shall have the same power of contracting and electing as adult employees," and hence does not require such minors to rely on the compensation act for damages.

The court had jurisdiction of the action for damages at common law and properly overruled the special demurrer and the general demurrer.

Of the errors assigned, the next for disposition is that relating to instructions. Did the court err in taking from the jury everything except the fixing of the damages?

On the point under examination, our own cases are not fully decisive. Plaintiff cites *Hankins v. Riemers*, 86 Neb. 307. In that case a master required his servant, a lad under 16, to do dangerous work in a cave, as a result of which the servant was killed. The administrator sued, but was defeated, and the opinion directed a retrial of the case because of an erroneous instruction on another point. As an aid to the trial court, this court quoted what is now section 7681 and in the second point of the syllabus stated the law thereon in these words: "If the employment of an infant under the age of 16 years, contrary to the provisions of the statute, is the proximate cause of an injury to the child, his master is liable therefor." In the discussion of specifically prohibited employment and of inherently dangerous work, leading up to that proposition of law, the court said: "The legislature may either designate such employments by name or it may prohibit child labor in dangerous work. In the latter event it is a question of fact, in each case to be ascertained from a consideration of the evidence, if not admitted in the answer, whether the work is dangerous. Proof that the child was injured would not in itself establish that the work was dangerous within the meaning of the law." The case is therefore of authoritative value only for the proposition that the trial court in the instant case, if the violation of section 7681 (the employment in a work "dangerous to life and limb") as alleged in the petition was relied on, could not entirely take the finding of proximate cause away from the jury

on that phase of the case; but it does not aid much in the other feature of the case now on review. However, the plaintiff herein relied in her pleadings on a violation of section 7681 and the case was tried on that issue as well as on others.

Rookstool v. Cudahy Packing Co., 100 Neb. 851, is cited in briefs of both parties. The boy injured was between 14 and 15 years of age at the time of the injury. The opinion, however, holds that, inasmuch as the petition counted only upon the common-law liability of the employer and all the proceedings upon the trial were upon that theory and it was thus submitted to the trial court, "this court upon appeal will so consider it, and the statute which prohibits the employment of minors between the ages of 14 and 16 years has no application." It was suggested in the course of the opinion, in reference to the provision requiring an employment certificate set out in the sections following the one which prohibits employment between the ages of 14 and 16 years, that it might be contended that this provision is rather in the interest of education than to protect it from unnecessary dangers, but the point was not necessary to be decided and the case was determined on the other point indicated above. That point never has been decided in this court, but it is raised by the issues and is argued by the appellant in its brief. More will be said of this later.

O'Neill v. Rovatsos, 114 Neb. 142, is cited by the appellee, but in that case the injured boy was under 14 years of age. His employment as a messenger was a violation of section 7669, Comp. St. 1922. It was absolutely and specifically prohibited, just as that section prohibits employment by children of that age in laundries. The trial court had erroneously directed a verdict for the defendant. This court held that, where a minor under 14 is employed in violation of section 7669 and is injured in the course of such employment, contributory negligence cannot be attributed to the minor, nor can he be held to have assumed the risk of the employment; and "that the question of

proximate cause is for the jury." If the proximate cause is for the jury in the case of a boy under 14, whose employment was there held to be in positive violation of section 7669, how can we logically escape the conclusion that the proximate cause is to be submitted, under proper instructions, to the jury in an action based on a violation of the companion section, 7670, by reason of the employment and injury of a girl between 14 and 16 years of age, who is not in all circumstances prohibited from working?

It would unduly prolong this opinion, and is unnecessary, to state fully the nature and contents of the employment certificate required in such a case. In short, it is a certificate from the superintendent of schools relating almost entirely to the attendance and qualification of the child. There are no references to the child physically, except that the certificate shall show that it "has reached the normal development of a child of its age, and is in sound health and is physically able to perform the work which it intends to do" (section 7672), and only in doubtful cases shall its physical fitness be determined by a physician. The evidence indicates that the plaintiff was in every way qualified to be properly certified and that when she engaged employment it was arranged that such a certificate would be obtained. Probably in the delegation of that duty it was overlooked.

It is apparent that the chief office of such a certificate is to provide that children who labor shall not be withdrawn from an opportunity to secure the rudiments of an education, though the complete fulfilling of the law requires at least a lay opinion that they are physically fit.

With reference to the educational purpose of the act, we have heretofore quoted what our court suggested on that subject in the case of *Rookstool v. Cudahy Packing Co.*, 100 Neb. 851.

In *Steel Car Forge Co. v. Chec*, 184 Fed. 868, the circuit court of appeals for the seventh circuit had under review and reversed a judgment obtained by a minor between 14 and 16 years of age, obtained in Indiana and involving a

failure to procure the employment certificate required in a statute much like ours. It is the same act that was involved in *New Albany Box & Basket Co. v. Davidson*, 189 Ind. 57, and referred to in the syllabus quoted in that part of this opinion relating to the compensation act. The court elaborately discussed the educational purposes of the act, held that in no way could it be said that the failure to observe the statutory requirements had a tendency to bring about the accident complained of, and that the trial judge erred in instructing the jury that the charge of negligence against the defendant was sustained if the jury found that the plaintiff was under 16 years of age at the time of the injury.

Lindell v. Stone, 77 N. H. 582, holds that, in a case of a boy 15 years' old, employed in a mill, where a statute prohibits under penalty the employment of children under 16 years while the schools are in session, without a permit from the school superintendent, non-compliance with the statute is not relevant upon the issue of defendant's negligence; and that the evident purpose of the legislature, so far as the law applies to children between 14 and 16 years of age, was to compel school attendance and to promote education.

Whatever efficacy is there in the failure to procure and file such a certificate, which might have been procured and filed, by which the law of the case is so transformed that the proximate cause of plaintiff's injury would be presumed when otherwise it would be submitted to a jury? Suppose the plaintiff had had a twin sister who had the same educational qualifications, the same physical qualities and state of health, who was working alongside plaintiff, in the same employment, and was injured by the same act. Could it be said to be the law that, if the twin sister had an employment certificate on file with the employer, she would have to prove and have the jury find that the negligence of her employer was the proximate cause of her injury and the amount of her damages, but that all the plaintiff would need to have submitted to the jury would

be the amount of her damages, as was done by the trial court in this case?

It should be borne in mind that the legislature has sanctioned the employment of children of plaintiff's age in laundries, provided the employer has secured a proper employment certificate for the child to work. That is the policy of the state. The work at which the plaintiff was engaged was not of itself so inherently dangerous as to be under the ban of public policy as a matter of law, whatever may have been the fact as to the alleged negligence of the employer, as to the kind and condition of his appliances to safeguard the employee when operating the mangle at which she was injured. By its classification in section 7670, work in a laundry was removed specifically from those employments prohibited a child over 14 and under 16 years and defined by the terms of section 7681, Comp. St. 1922, as "any work which by reason of the work, or place of performance, is dangerous to life or limb," or at any rate it would ordinarily be at best a question of fact for the jury, rather than of law for the court, to decide if the place of work in this particular laundry and at the particular mangle at which plaintiff received the injury was one of such inherent danger as to remove it from the expressly permissible occupations described in section 7670.

We think the main purpose of requiring the employment certificate is educational, though the health and physical fitness is an element to be considered in issuing it; but failure of an employer of a child under 16 and over 14 to secure the employment certificate prescribed by section 7670 cannot be said to be the proximate cause of an injury to the child; evidence of such failure to procure the certificate is material only for the purpose of sustaining the right to bring an action at common law rather than under the compensation act.

It was a question for the jury whether the negligence of the employer was the proximate cause, or a contributing cause, of the plaintiff's injury.

The trial court assumed that the facts of the injury of plaintiff, and the proximate cause of the injury, were matters of law for him to decide, upon which he could predicate actionable negligence of the defendant without the intervention of a jury. This indicates a reversal of the judgment and a new trial at which the negligence of the parties should be submitted to the jury and decided by them under appropriate instructions from the court in harmony with this opinion. Judgment accordingly.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. HENRY H. LOVELL.

FILED JANUARY 4, 1929. No. 26808.

1. **Contempt**: EDITORIAL ON CASE PENDING. Publisher's editorial on a case pending in court set out in opinion and *held* contemptuous *per se*.
2. ———: ———: SUFFICIENCY OF EVIDENCE. In the prosecution of a publisher for contempt by the publication of editorial comments on the court in connection with a pending case, the editorial itself, the disclosed purpose to influence the court in making a decision and the effect intended are subjects of judicial scrutiny and consideration and may be sufficient to refute defendant's oral evidence of his innocence and of his intention to exercise the freedom of the press as guaranteed by the Constitution.
3. ———: ISSUE OF GUILT QUESTION OF FACT. Defendant in a prosecution for constructive contempt of court by abusing the freedom of the press in commenting on pending litigation may testify to his intent, but the issue of guilt is a question of fact determinable by the court from all the evidence.
4. **Constitutional Law**: FREEDOM OF THE PRESS. The freedom of the press implies the publisher's respect for the constitutional rights of others, including the rights of litigants to appear before an independent, impartial court, uninfluenced or embarrassed by contemptuous publications pending litigation.
5. **Contempt**: DUTY OF COURT. It is the duty of a court of justice to protect its purity, impartiality and independence and the rights of litigants from extraneous and lawless influences.

6. **Constitutional Law**: FREEDOM OF THE PRESS. The freedom of the press does not extend to contemptuous interference with pending litigation.

Original proceeding for contempt against Henry H. Lovell. *Judgment of conviction.*

O. S. Spillman, Attorney General, and *George W. Ayres,* for the state.

Henry H. Lovell, pro se.

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

ROSE, J.

In a prosecution by the state in the supreme court of Nebraska, the attorney general by formal information charged Henry H. Lovell, defendant, with contempt of court. He was found guilty and for the offense charged the court imposed upon him a sentence of imprisonment in the Douglas county jail for a period of ten days.

Defendant wrote, printed, published and circulated in Nebraska an editorial or article of which the following is a copy:

"Court Cannot be Corrupted.

"Since Judge *Shepard's* decision in the case of *Price et al. v. W. A. Fraser et al.,* as officers of the Woodmen of the World, and the appeal of the case by the defendant officers to the Nebraska Supreme Court, the question has, of course, been widely discussed as to the possibility of a reversion of the decree by the Supreme Court when it is taken up as planned October 6th next.

"The Forum is confident that Judge *Shepard's* decree will be sustained and the order through its officers and the Globe Life Insurance Company through its officers, who have also been officers of the Woodmen of the World, required to restore to the treasury of the Woodmen of the World the approximately $2,000,000.00 of cash and other

assets which the Lancaster county court held were fraudulently and wrongfully used.

"Our opinion is, as any editorial opinion worth while always is, not a personal idea of the individual, but the maturely crystalized concensus of opinion of a large number of competent and honest minds, omitting, of course, naturally the attorneys directly interested on the other side. The almost unanimous opinion of the legal fraternity is that Judge *Shepard's* decision was entirely sound and will be promptly sustained by the Nebraska Supreme Court, but one idea differing from this has been expressed, and since this idea, quite extensively passed about, strikes so at the foundations of our government that we cannot ignore it. That gossip in flavored form suggests the thought that on some flimsy pretext or technicality enough members of the Nebraska Supreme Court can be influenced to reverse the decision of Judge *Shepard* and undo all the work that has been done by the plaintiffs and their attorneys in protecting the interests of the membership of the Woodmen of the World. The appellants, Mr. Fraser and his associates, through their attorneys, have filed their brief. It has been designated and we sympathize with that designation as one of the rankest pieces of pettifogging ever presented to the Supreme Court of Nebraska. The defendants, on appeal, have filed their answer and to the layman there would seem to be no occasion to worry but that the Supreme Court would promptly sustain Judge *Shepard.* The case, of course, must be decided by the Judges, and we prefer to withhold a detailed article showing the presentations of both sides of the case until we can announce the decision of the Supreme Court.

"But when a situation exists, built up through gossip or otherwise, that leads a man, not a philanthropist, to offer to bet that the Supreme Court will reverse Judge *Shepard* in this case, and asserts as the reason for his position that interests friendly to the Woodmen of the World gang are in a position to influence the Judges of our Supreme Court, it is time they were defended.

"We do not believe that Judge Thompson can be influenced in the slightest degree because his son has been temporarily or otherwise in the employ of one of the supposed supporters of Mr. Fraser.

"We do not believe that Judge Goss would be affected by the gestures of Mr. Bradshaw towards the social advancement of his daughter.

"We do not believe that Judge Howell is under such obligations to any interests favorable to Mr. Fraser that warrants a fear that he might be influenced in their favor.

"In fact we believe that the entire membership of our Supreme bench is representative of the people of Nebraska and not of any special interests and that the rights and the money interests of the thousands of our citizens constituting the local membership of the Woodmen of the World, as well as the grand total of approximately one-half million members, citizens of other states, are safe in the hands of the Nebraska Supreme Court.

"It would seem that the importance of the matter warrants as near immediate decision as is possible. The defendants on appeal have clearly and simply stated their case and no better move to more firmly establish the idea of the integrity of the court could be made than to have the decision handed down in advance of the coming general election."

The information in the contempt proceeding contains a copy of the newspaper article and charges that it was unlawfully and contemptuously written, printed and published by defendant with intent to hinder the due administration of justice in the pending suit. The publication appeared September 15, 1928, in *The Forum,* a monthly periodical or newspaper "Devoted," as indicated by its cover, "to the insurance interests of the public and the best elements of all branches of underwriting." Defendant was the writer, editor and publisher.

The pending suit to which the publication referred was a controversy between members and executive officers of the Woodmen of the World, a fraternal beneficiary society

carrying life insurance on its members. The complaining members were plaintiffs and the executive officers and the Globe Life Insurance Company were defendants. An issue raised by the pleadings was the misuse by the officers of fraternal funds or property to the extent of approximately $2,000,000 for the purpose of organizing the Globe Life Insurance Company to write what is called "Old-Line Life Insurance," as distinguished from fraternal insurance. The pending suit was one in equity, tried and determined in the district court for Lancaster county, Judge Frederick E. Shepherd, presiding. From a decree against the Globe Life Insurance Company and the executive officers of the Woodmen of the World, requiring them to restore the misappropriated funds, they appealed to the supreme court, where the case was pending for trial *de novo* September 15, 1928, when the editorial or article under consideration was published.

Defendant Lovell was cited to appear November 19, 1928, and show cause, if any, why he should not be punished for contempt. At the appointed time he appeared personally in open court and presented an answer in which he regretted he was not financially able to be represented by eminent counsel; admitted publication of the article in the September issue of *The Forum;* denied he wrote it unlawfully or contemptuously or to obstruct proceedings in the pending suit or to hinder the due administration of justice therein; denied he intended to be contemptuous or disrespectful toward the court; expressed regret, if the publication was susceptible to an interpretation not intended, and offered an apology in that event; asserted he had at all times the greatest respect for the supreme court and for each member thereof; relied on its justice and humanity to protect him from false accusations; prayed for acceptance of his apology, if he had inadvertently committed any offense, and for dismissal of the prosecution. He expressed his willingness to submit his defense on his answer and on oral statements in harmony with it, but he was reminded from the bench of the gravity of the accusa-

tion against him and on the court's own motion he was given until November 26, 1928, to procure counsel and to prepare for trial.

Upon the convening of the court at the time fixed he again stated he was not financially able to employ eminent counsel and asked permission to act for himself in making his defense. His right to do so was recognized. He did not produce any witness in his own behalf, but was called to the witness-stand by the state. In answering questions by the attorney general and by members of the court he gave under oath his own interpretation of the published article and explained in detail the motives and the intent that prompted him in preparing and publishing it. He also exercised the right of advocacy in his own behalf. In his testimony he admitted sole responsibility for writing and publishing the editorial as reproduced in the information; said the rumors published by him had been previously circulated; admitted he did not inquire at the sources of knowledge to ascertain the facts concerning the rumors published by him; justified publication of them to give assurance that the court would not be influenced by them in deciding the pending case; expressed confidence in and respect for the supreme court and for each member thereof; disavowed any intention to be disrespectful or contemptuous. Defendant also expressed the conviction that he intended to keep within his rights when making his comments on the court in connection with the pending suit and argued that his publication required an innuendo to make it contemptuous, that the information did not contain an innuendo, and that consequently his explanation and apology should be accepted and the prosecution dismissed.

If defendant in his testimony and explanation truly interpreted his intent and attitude, the publication and circulation of his editorial were nevertheless unlawful. The published article was of itself contemptuous. It gave the court, the litigants and the public, in unmistakable terms, an impression at variance with the author's expressed in-

tent and attitude. It asserted when and how the pending case should be decided by the supreme court. It meant that, before the November election, there should be an affirmance of the decree requiring defendants in the suit pending on appeal to restore to the Woodmen of the World approximately $2,000,000 in misappropriated money or property. When and how the appeal should be decided were questions for judicial determination. The opinion of the editor and "The maturely crystalized concensus of opinion of a large number of competent and honest minds," to which he referred, were not factors for judicial consideration in disposing of the appeal. The resort to "The almost unanimous opinion of the legal fraternity" to show the soundness of Judge Shepherd's decision was improper. The supreme court is required by statute to dispose of the appeal without reference to the conclusion reached in the district court. Comp. St. 1922, sec. 9150. Furthermore, the published rumors were all without foundation in fact. The deliberate purpose to influence the judgment of the supreme court cannot be explained away. Defendant knew the civil case was pending on appeal. The article so shows on its face. It shows also that he considered the publication an editorial. Defendant took liberties the litigants themselves could not lawfully take. Parties to a pending action are not permitted to influence the court or a member thereof privately or through the press on the merits of pending litigation. Publishers have no greater rights. On the merits of a contested case the parties are heard in the presence of each other in open court. This is the system provided by law. Objectionable interference by strangers pending litigation is forbidden.

The test of guilt in a prosecution like this is not necessarily found in the mental processes by which the publisher, according to his testimony, justifies his utterances. What the article itself expresses, the motive of the author thus disclosed and the effect intended are subjects of judicial scrutiny and consideration and may be sufficient to refute oral evidence of innocence and the intention to ex-

ercise a constitutional right. The issue is one of fact for the court. The published article, the answer prepared by defendant in his own behalf, his testimony on the witness-stand, his advocacy at the bar, and his use and understanding of the English language show an intelligence and a mental acumen that make him answerable to the state according to the true import of what he wrote, published and circulated.

The freedom of the press vouchsafed by the Constitution implies the publisher's respect for the equal rights of others. One of those rights that the publisher is bound to respect is a litigant's privilege of appearing before an independent, impartial court for judicial redress, uninfluenced or embarrassed by contemptuous publications pending litigation. Under the Constitution this right is as sacred as the freedom of the press. By both state and federal Constitutions government is composed of distinct legislative, executive and judicial departments of equal rank. The judiciary is an independent tribunal to which the individual may resort whenever his property rights are invaded by private wrongdoers, by public agencies or by the legislative or executive departments. In controversies over rights guaranteed by the Constitution the individual stands before the court on an equality with government itself. The constitutional provision creating an independent judiciary is recognized by historians, philosophers and statesmen as a vast contribution to the science of government. To preserve the purity, impartiality and independence of the court is a solemn duty that cannot be evaded without endangering all constitutional rights, including the freedom of the press.

Each member of the court has an abiding conviction that defendant's editorial and the published rumors will not affect his judicial conduct in the pending case. If that conviction is well founded, a proper disposition of the suit pending on appeal will not efface the evil arising from the contempt. A judicial decision should be free from even the suspicion of intimidation, coercion or other ex-

ternal influence. If the judiciary is happily unmoved by the editorial in determining the appeal, the litigants, the public and the respect due to the courts of justice must still be considered. Will the appellants have a suspicion that the court was intimidated or otherwise improperly influenced by the publication in the event of an affirmance in accordance with the editor's expressed view as to what the decision should be? If appellants prevail and the judgment against them is reversed will appellees have a suspicion that the court permitted indignation arising from the publisher's article to influence the decision? Will the public or the readers of *The Forum* suspect coercion of the court if the judgment is affirmed? Will the appellants suspect that the article condemning them was inspired by appellees? The editorial, if disregarded by the court, would have a tendency, at least, to arouse such suspicions and to lessen confidence in the judicial decision, whatever it may be.

The constitutional provision that "Every person may freely speak, write and publish on all subjects" is followed by the restriction, "being responsible for the abuse of that liberty." Const., art. I, sec. 5. Abuses of the press in commenting on pending litigation with a view to influencing judicial action have been rare. Punishment of publishers for contempt has seldom been imposed, but statutory and common-law power to do so has long been recognized and occasionally exercised. Comp. St. 1922, sec. 9189; *State v. Bee Publishing Co.*, 60 Neb. 282. The freedom of the press and its powerful agency in the evolution of just and efficient government are scrupulously protected by the court. *Howell v. Bee Publishing Co.*, 100 Neb. 39. This freedom, however, does not extend to contemptuous interference with pending litigation.

The evidence establishes the guilt of defendant beyond a reasonable doubt. This conclusion is wholly free from resentment or revenge. No fine has been imposed. Imprisonment is limited to ten days. This leniency is ex-

tended to defendant out of consideration for his pecuniary situation and the needs of his family.

SENTENCE ACCORDINGLY.

THEODORE GRIESS V. STATE OF NEBRASKA.

FILED JANUARY 4, 1929. No. 26387.

Instruction set out in the opinion examined and disapproved under the record made.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

Mullen & Morrissey, Waring & Waring and *C. L. Stewart,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and HOWELL, JJ., and REDICK, District Judge.

HOWELL, J.

Plaintiff in error brings this case to us from the district court for Clay county, wherein he was convicted, on counts one and two, of embezzlement, abstraction and wilful misapplication of $2,773.63 and $2,932, respectively, funds of Nebraska State Bank of Harvard, of which he was president.

Errors assigned are seven in number, but we will mention only the following: (1) Denying a continuance; (2) admitting evidence concerning books and records of the Omaha National Bank, not present in court; and (3) error in giving paragraph No. 4 of the instructions. In view of our conclusions, it is not necessary to pass upon the correctness of the ruling of the court denying plaintiff's application for a continuance.

Since this case is to be remanded for another trial, we do so with the mere admonition that it may be well to

obviate the criticisms of counsel for plaintiff in error as to testimony concerning what the records of Omaha National Bank do or do not disclose. However, we suggest that there may be a distinction between a negative showing that certain papers (not numerous), touching a subject, do not show a certain fact or recital and that no such documents exist.

Paragraph 4 of the instructions, criticised, presents a boundary line question. It reads:

"The evidence in this case is somewhat involved covering many different transactions, records and entries of accounts. The particular things, however, upon which the charge is based are not so complicated or difficult to understand, and I will explain to you somewhat the theory upon which both the prosecution and defense have presented their sides of the case.

"The charge made by the first count of the information is in reference to the embezzlement, abstraction or wilful misapplication of the funds of the bank in an amount of $2,773.63, which, according to the theory of the prosecution, was made up of two certain items of $773.63 and $2,000, respectively, which it is claimed the defendant obtained by crediting the same in the books of the bank $773.63 in his own personal account and $2,000 in the account of Griess & Thomas, and that the defendant did not at the time put in any moneys, bills of exchange or funds of any kind for such credit, so that he thereby effected a disposition of the moneys and funds of the bank which he afterwards checked out from the two accounts for his own use and benefit.

"In the second count the charge is based upon transactions whereby it is claimed the defendant issued five certain checks in the amounts of $800, $410, $500, $510, and $712, respectively, the aggregate amounting to $2,932, which he put in circulation, and afterwards, when in the course of business they were returned to the bank for payment, he caused them to be paid from the funds of the bank by means of a draft issued therefor which included

the total amount of said checks and also other items of exchange making the total of the draft in which it is claimed payment of these checks was included the sum of $7,010.13.

"The foregoing are the particular items upon which the charges are based in this case. The other items and transactions referred to in the evidence are claimed on the part of the state to be transactions made for the purpose of carrying on or covering up or concealing the original misapplication of the funds occasioned by the transactions first above referred to and are to be considered by you only in so far as they may throw light upon the character, quality and purpose of the transactions themselves.

"The defendant relies upon his plea of not guilty and his claim that the evidence introduced on behalf of the state is not sufficient to authorize his conviction upon either offense charged. The defendant did not testify in his own behalf, and you are instructed that, although the statute of this state provides that a person charged with a crime may testify in his own behalf, yet he is not under any obligation to do so, and the statute also expressly declares that his neglect to do so shall not create any presumption against him."

After having stated to the jury that the evidence is somewhat involved, the court said: "The particular things, however, upon which the charge is based are not so complicated or difficult to understand, and I will explain to you somewhat the theory upon which both the prosecution and defense have presented their sides of the case." There is a monitory tinge, molecular it is true, in the words of the court, which tends to indicate a warning that, while there is an involvement, yet it must not be regarded as troublesome, since the particular things charged against the defendant are not complicated or difficult to understand. The court then definitely explained that two specific items, testified to as to count one, made up the embezzled item charged, according to the theory of the prosecution. The same was repeated as to count two, only

five items were called to the attention of the jury instead of two. The court then states, "The foregoing are the *particular items upon which the charges are based*" (italics ours), thus directing the minds of the jury to such items only, to the exclusion of all others shown in the books, records and deposit slips in evidence.

Standing alone, it may be doubted whether the province of the jury was invaded. The jury were then told, in effect, now that you know what items to consider, "the defendant relies (for an acquittal) upon *his plea of not guilty* and his claim that the evidence introduced *on behalf of the state* is not sufficient to authorize his conviction." (Italics ours.)

In this state, the presumption of innocence, afforded one charged with crime, rises to the dignity of evidence and follows him throughout the trial. The effect of the charge was to tell the jury the defendant relied upon the insufficiency of the state's evidence alone, and his plea of not guilty, and not upon the evidence of presumed innocence with which the law supplied him. In effect, the law produces evidence of innocence on behalf of every accused person put upon trial for crime, which evidence must be weighed fairly by the jury and overcome by other evidence to the point that his guilt has been proved beyond a reasonable doubt. The instruction effectually wasted that presumption, or evidence, to the prejudice of defendant, as if it applied to a witness on the stand, testifying in his behalf. The subsequent instruction, that "the defendant is presumed to be innocent * * * until he has by sufficient evidence been proved to be guilty; and it is the duty of the jury to give the defendant the full benefit of this presumption as evidence in his favor," etc., does not cure the painful statement that "the defendant relies upon his plea," etc., to escape his dilemma.

Taking the case as a whole, we have been impressed with the words of the learned trial judge: "I cannot get from the history of this case as it comes to me any venal quality in the acts of the defendant," although we do not

lodge a reversal on that language. At oral argument, some time was spent on the meaning of "venal." It may very well be said to mean dishonesty, infidelity, faithlessness, perfidy, treachery, unfairness, baseness, turpitude, rascality, and improbity, and we would hesitate to believe that it excludes embezzlement. We are also inclined to say that the instruction complained of is too argumentative.

For the reasons indicated, the judgment of the district court is

REVERSED.

FRANK E. FOLTS ET AL., APPELLEES, V. GLOBE LIFE INSURANCE COMPANY ET AL., APPELLANTS.

FILED JANUARY 4, 1929. No. 26604.

1. Insurance: BENEFICIAL ASSOCIATIONS: MISAPPROPRIATION OF FUNDS: SUIT TO RECOVER. A member of a fraternal benefit corporation, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, may sue the corporation and its officers for himself and all others similarly situated, to recover corporate funds wrongfully misappropriated, when it appears that an appeal to such officers and the supreme governing body for redress would be ignored or denied.
2. ———: ———: FORFEITURE OF MEMBERSHIP. A provision in in the constitution and laws of a fraternal benefit corporation, voiding the certificate of membership of a member, if he, for any cause, at any time, for any purpose, institutes a suit against the corporation or any of its officers because of any action done or contemplated by such officer or a committee of the corporation, without first submitting his grievances to and exhausting his remedies before the proper tribunals, is not applicable to an act done by the supreme governing body from which no appeal lies.
3. ———: ———: LIMITATION OF POWERS. No fraternal benefit corporation, organized under the laws of Nebraska, has any power, directly or indirectly, to write insurance or issue membership certificates for profit; nor can it use its funds to incorporate an old line insurance stock corporation and subscribe for its capital stock to be sold to members of the fraternal, under the guise of having such stock company cooperate with the fraternal in writing a line of insurance not permitted to fraternals.

4. ———: ———: ———. Such fraternals, having surplus funds available for investment in securities prescribed by its constitution and laws, cannot organize and subscribe for the whole of the capital stock of a business corporation, under the pretext that such transaction constitutes an investment.

5. ———: ———: INVESTMENT IN STOCK COMPANY: ULTRA VIRES. When, as in this case, a fraternal benefit corporation, organized and carried on under the laws of the state, for the sole benefit of its members and beneficiaries, and not for profit, causes its officers to organize a stock insurance corporation, using the funds of the fraternal to subscribe for the capital stock and surplus of the insurance corporation, such transaction is *ultra vires* of its charter, unlawful, against public policy, and void.

6. ———: ———: EXEMPTIONS AND RESTRICTIONS. Fraternal benefit insurance organizations, while exempt from the statutes relating to insurance corporations and corporations generally, are not exempt from the general principles of law which confine all corporations, societies and associations to the objects and purposes of their existence.

7. ———: ———: AMENABLE TO STATUTES. Fraternal societies, as such, are generally left free to determine their own course on matters relating to qualifications, discipline, control and conduct of their members concerning internal government; but, in matters of business, property rights and contracts, they are answerable to the laws of the land, and, in these latter respects, they have no implied power to stray from the purposes declared in the statutes under which they are organized.

8. ———: ———: INVESTMENT IN STOCK COMPANY. Under the facts in this case, the organization of the Globe Life Insurance Company by Sovereign Camp Woodmen of the World and its officers, and their subscribing for the entire capital stock of the Globe Life Insurance Company, in no sense constituted a consolidation under chapter 122, Laws 1925.

9. Corporations: ULTRA VIRES ACTS: EQUITABLE RELIEF. Laches is a creature of equity. Equity will deny relief as to consummated purely *ultra vires* acts of a corporation, even though it be technically expedient and proper, when to grant it will occasion the public great inconvenience, and the defendant serious loss, if the plaintiff may be readily compensated in damages.

10. ———: ———: ———. In determining whether equitable relief will be granted in a given case, courts will balance the equities and govern themselves accordingly; and, in doing so,

will take into consideration whether the act complained of is merely *ultra vires*, or is against public policy, unlawful, and wholly void.

11. Insurance: BENEFICIAL ASSOCIATIONS: ULTRA VIRES ACTS: LACHES. Under the facts in this case, *held*, the plaintiffs are not estopped, nor precluded by laches, to maintain this suit.

12. ———: ———: MISAPPROPRIATION OF FUNDS: APPROVAL BY DEPARTMENT OF TRADE AND COMMERCE. The fact that the department of trade and commerce is vested by law with supervisory powers over insurance business conducted within the state, and that it approved the transaction in question, can afford no protection to wrongdoers.

APPEAL from the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond, Gaines, McGilton, Van Orsdel & Gaines and *Hainer, Flansburg & Lee*, for appellants.

A. M. Morrissey, M. L. Donovan, C. J. Campbell, G. E. Hager, Don W. Stewart, John P. Breen, William B. Price and *W. H. Hatteroth, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON, EBERLY and HOWELL, JJ.

HOWELL, J.

This is an appeal by Globe Life Insurance Company, Sovereign Camp Woodmen of the World, W. A. Fraser, John T. Yates, T. E. Patterson, and J. E. FitzGerald, from a decree of the district court for Lancaster county, requiring all appellants, except Sovereign Camp Woodmen of the World, to return to Sovereign Camp Woodmen of the World certain bonds and moneys aggregating $2,000,000, paid to the Globe Life Insurance Company by Sovereign Camp Woodmen of the World and individual appellants in subscribing for practically the total capital stock of Globe Life Insurance Company, which appellees, Frank E. Folts, Charles Bowen, and William B. Price, as plaintiffs, and Alex F. Hummel, as intervener, claim to have been illegal

and fraudulent, and enjoining each and all of the appellants from using the good will, property or organization of Sovereign Camp Woodmen of the World in the business of Globe Life Insurance Company.

Appellees will be referred to as plaintiffs, Globe Life Insurance Company as Insurance Company, and Sovereign Camp Woodmen of the World as W. O. W.

The petition and the petition of intervention are quite lengthy and, in a general way, seek the same relief.

Plaintiffs sue, as members of W. O. W., for themselves and all others similarly situated, and aver: W. O. W. is a Nebraska fraternal benefit corporation, organized for the sole benefit of its members, and not for profit, with a membership of about 450,000, carrying insurance of about $750,000,000; plaintiffs are members, in good standing; the individual defendants, with others, compose the Sovereign Executive Council of W. O. W., also are members of the Sovereign Camp, and, in violation of the articles of incorporation and the statutes of Nebraska governing fraternals, conspired to organize the Insurance Company with funds of W. O. W., and to divert its business to the Insurance Company; on June 16, 1927, certain officers of the Executive Council caused the Sovereign Camp to adopt a resolution directing the Executive Council to organize a legal reserve life insurance company, with capital and surplus of $2,000,000, to be paid from funds of W. O. W.; the defendant officers did organize and incorporate the Insurance Company on October 31, 1927, under the laws of Delaware, its capital stock and surplus to be paid before commencing business; its nature, objects and purposes were to issue contracts of annuity, endowment, disability, accident, health, and other forms of life insurance, and to reinsure and coinsure contracts issued by other corporations; defendants Fraser, Yates, Patterson and others were elected president of the board, vice-president and secretary, respectively, of the Insurance Company, and, on November 1, 1927, caused certificates of stock of Insurance Company

to be issued to themselves, others and W. O. W., representing $2,000,000 in face and surplus value, $1,997,200 being issued to Fraser and Yates as trustees of W. O. W., and caused bonds and cash of the total value of $2,000,000 to be turned over to the Insurance Company, including $100,000 in bonds deposited on December 16, 1927, with the department of trade and commerce of Nebraska; November 14, 1927, said officers procured certificates in Delaware and Nebraska, authorizing the Insurance Company to do business in both states; under its articles of incorporation and laws of Nebraska, W. O. W. had no authority to do such things; the organization and purchase of the stock of the Insurance Company were illegal and void; organizers and deputies are being trained to sell insurance for the Insurance Company and to solicit members of W. O. W. to purchase such insurance; circulars, pamphlets, letters and other advertising are being circulated among the members of W. O. W., commending the Insurance Company for its line of insurance; the officers of W. O. W. are devoting their time and funds of W. O. W., and its good will, to acquire business for the Insurance Company, greatly injuring W. O. W.

The prayer is that the bonds and money, turned over to the Insurance Company, be returned to W. O. W; the officers named be removed and an election of new officers ordered; a permanent injunction be issued to prevent defendants from interfering with the business of W. O. W.; the Insurance Company be ordered to pay W. O. W. for losses and damages, and for general equitable relief.

The petition of intervention contains similar allegations, in addition to others, among which, that the individual defendants were officers of both the Insurance Company and W. O. W.

Defendant Bliss, secretary of trade and commerce, filed no answer or other pleading, except a general demurrer, which was overruled.

W. O. W. answered, in substance: Admitted practically

all of the allegations of the petition except illegality and fraud; alleged that it was a self-governing body, with a lodge system, organized under the laws of Nebraska, in the name of Sovereign Camp of W. O. W., made up of elective officers and delegates; under its constitution and laws, it is authorized to conduct the business affairs of W. O. W., and it had provided for investments of accumulated funds as authorized from time to time; Sovereign Camp authorized the use of $1,997,200 of surplus funds of W. O. W. to subscribe for stock in the Insurance Company; it had ample funds for all purposes and a large surplus, exclusive of the mortuary funds, justifying such investment; it became apparent to the officers of W. O. W., and to the members of Sovereign Camp, it would be to the best interests of W. O. W. to offer to its members forms of life insurance *which it was not permitted to write under the laws* (italics ours), which fact was called to the attention of the Sovereign Camp in 1925, when the Sovereign Commander (Mr. Fraser) was requested to submit plans for writing such insurance, which he, accordingly, did at the Sovereign Camp meeting in June, 1927; the report was submitted to a committee which reported by resolution, directing the Executive Council to organize a corporation, invest surplus funds in its stock, and sell the same to its members; the members of the Sovereign Camp and officers of W. O. W. were wholly actuated by a desire to serve the best interests of W. O. W. and its members, and to strengthen W. O. W.; pursuant to the resolution, the Insurance Company was formed; about December 10, 1927, full information concerning the stock was mailed to every member, advising them that they might buy as much thereof as they desired; the plaintiffs are without equity, having no interest in the association; suit was not brought in good faith, and, even if plaintiffs had any legal right to have the funds of W. O. W. apportioned among the members, each would receive less than $5; immediately after adoption of the resolution, it was fully explained to plaintiffs and all members as

to the plans, by notice through the mails, and such action was known to and discussed by the members long before suit was brought; in reliance upon the resolution, said stock was purchased and paid for by W. O. W., and Insurance Company entered upon the business of life insurance; when this suit was commenced December, 1927, the stock had been resold by W. O. W. to members and a large amount of life insurance had been issued to, and premiums paid thereon by, policyholders, in reliance upon the action of June, 1927, and acquiescence by all members; to grant the prayer of the plaintiffs, compelling restoration of the funds of W. O. W., great and irreparable loss and damage would be caused to W. O. W. as the principal stockholder, to the Insurance Company, and to its policyholders, without corresponding benefits to any one; neither the plaintiffs nor any member complained of, or protested, the action taken; by reason of all of which the plaintiffs are estopped, and, because of their acquiescence, laches has been such as to deny equitable relief.

Further answering: Plaintiffs have no capacity to sue, for that, as section 57 of the constitution and laws provides for automatic forfeiture of membership if a member should sue W. O. W. or its officers before submitting his grievances to their consideration, and by final appeal to the Sovereign Camp, they had lost their membership by bringing this suit, since the Executive Council had a session of the Sovereign Camp scheduled for February, 1928. (We now observe that no appeal to any power short of the Sovereign Camp would have availed, and for plaintiffs to have delayed all action until the Sovereign Camp meeting scheduled for February, 1928, would have greatly reinforced the plea of laches. Moreover, there could be no appeal from actions of the Sovereign Camp. It is certain, a request addressed to it to retreat would have been ignored, neglected or instantly denied. The law does not require the doing of idle things).

The Insurance Company filed a similar answer, plead-

ing affirmatively: Its incorporation under the laws of Delaware, to engage in life insurance business; it caused a large amount of insurance to be written for which it collected premiums; adopted all of the allegations of the answer of W. O. W., and plead estoppel.

Answers were filed for Fraser, Yates, FitzGerald, and Patterson, and Fraser and Yates as trustees, adopting the answer of W. O. W.

Replies were filed by plaintiffs to each answer.

Answers were filed to the petition of intervention, adopting, in the main, the several answers to plaintiffs' petition, to which suitable replies were filed.

It being quite impossible to go into details, we deem it sufficient to state the situation generally.

W. O. W. was organized in 1890 under the laws of Nebraska, as a nonprofit fraternal benefit association, continuously thereafter doing business as such. The articles of incorporation and laws of the association and the laws of Nebraska existing in 1927, when officers of W. O. W. organized the Insurance Company, will be referred to, pausing to observe that, under the laws of Nebraska existing until 1887, fraternal benevolent societies, issuing certificates of insurance, were subject to the general corporation and insurance statutes in force, and, by act of the legislature (Laws 1887, ch. 18) they were exempted therefrom. Section 7902, Comp. St. 1922, as amended by chapter 120, Laws 1925, provided: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such beneficiary association shall have a lodge system, with ritualistic forms of work, and a representative form of government."

The consitution and laws of W. O. W., in effect September 1, 1927, provided, among other things: Section 1. "This corporation shall be known as the 'Sovereign Camp

of the Woodmen of the World,' * * * and its supreme legislative body shall be known as the Sovereign Camp."

In section 2, W. O. W. is given original and appellate jurisdiction as to general welfare; power to determine charges against members and appeals from Camps, Head Camps and the Sovereign Executive Council; to enact laws; levy and collect assessments, premiums and dues "necessary to pay all beneficiary claims and expenses of management, and shall have generally such powers and may perform such duties as it may deem wise for the welfare of the association."

Section 3. "The objects of this association shall be to combine white persons of sound bodily health, * * * into a secret, fraternal beneficiary and benevolent association; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; create funds," etc.

Section 25 provides, among other things, that the Sovereign Camp shall have *de novo* jurisdiction over offenses committed by members for "instituting suits or legal proceedings against the Sovereign Camp or any of its officers without first submitting grievances or complaints to the Sovereign Executive Council for adjudication," and that appeals are taken from camp trials to the Sovereign Commander, thence to the Sovereign Executive Council, thence to the Sovereign Camp; all other appeals to be from the Sovereign Commander to the Discipline Committee, thence to the Executive Council, thence to the Sovereign Camp.

Section 57 provides, among other things: "If a member, for any cause whatever, shall at any time or for any purpose institute a suit or suits for any cause or complaint against the association or any of its officers, *because of any action or contemplated action of such officer* (italics ours) or on account of the action of any of its committees, without first submitting his grievances to and exhausting his remedies before the proper tribunals of this association,

his beneficiary certificate shall at once become void and of no effect, and all payments theretofore made thereon shall be retained by the association as liquidated damages," etc.

Section 89 provides, among other things, that a member, who is found guilty of violating association laws, may be expelled from fraternal relations and benefits for a time or for life, but, where the member is expelled from fraternal benefits and relationships, "he may retain his insurance protection by paying the assessments on his certificate," if so determined by the person, committee or body before whom he is tried.

Section 95 provides: "As often as practicable, when funds have accumulated not immediately needed to pay the obligations of the association," they shall be invested in bonds of the United States, state, or subdivision of a state, in federal farm loan bonds, or notes secured by first lien real estate mortgages, "and may make such other investments as may be at any time authorized by the Sovereign Camp," which investments (section 93) "may be used for the payment of benefits and monument obligations when the beneficiary fund on hand, together with one beneficiary instalment of assessment per month on all of the members of this association, is not sufficient to pay the approved beneficiary and monument obligations," and "if the uninvested fund on hand, together with said one instalment of assessment and beneficiary funds on hand, are not sufficient to pay such approved beneficiary and monument obligations, then the Sovereign Commander and Sovereign Clerk shall convert so much of the invested fund into money as may be sufficient to meet the excess of losses over that which the said one instalment of assessment, together with the beneficiary fund and uninvested funds on hand, will pay, which shall be transferred to and placed in the beneficiary fund and disbursed for the payment of such approved claims and obligations as aforesaid."

The Sovereign Executive Council was ostensibly author-

ized and directed, by resolution passed June 16, 1927, to do the following: "To organize a legal reserve life insurance company with an authorized capital stock of not less than $1,000,000, and cause to be issued so much of said capital stock from time to time as may in their judgment be necessary; * * * said capital stock shall be sold at 2 to 1, that is to say, each $1.00 of capital stock shall be sold for $2.00 to cover the capital and surplus, and the amount issued and delivered to this association shall be paid for at said rate, and shall be held by said association as its other investments are held, except that it may sell all or any portion of such capital stock to the members of this association in such amounts as the members may desire to purchase;" the board of directors of the corporation to be organized "shall at no time exceed twenty-one members, and that at all times fourteen of said members shall be the Sovereign officers of this association;" the corporation "shall be incorporated in such state and with such name and for such amount of paid-up capital stock as the Executive Council of this association shall determine," and such officers are "directed to draw upon the funds of this association for such sum as may be necessary to pay for the capital stock of such life insurance company issued to this association, and to make payment to said life insurance company of the amount of the capital stock so purchased by this association upon the delivery to said association of said capital stock."

About two years before June, 1927, the Sovereign Commander began to formulate in his mind some plan to circumvent the recognized limitations of a fraternal benefit association to write old line insurance. In 1925, the legislature (Laws 1925, ch. 122) authorized fraternal beneficiary associations to consolidate or make reinsurance contracts with other associations or organizations or life insurance companies authorized to do business in Nebraska, requiring a certain procedure. In 1927, the legislature (Laws, 1927, ch. 135) authorized corporations and associations,

having a representative form of government without capital stock, doing business without profit for the sole benefit of their members and beneficiaries, to change their form of government and the character of insurance they should write, and become legal reserve life insurance companies.

W. O. W. did not seek to take advantage of either act, but sought to go around both by organizing the Insurance Company. Prior to the Sovereign Camp meeting at Los Angeles in June, 1927, the Sovereign Commander worked out a plan which he then submitted to the Sovereign Camp. A committee was appointed to investigate and report on that plan. It reported in the form of the resolution above referred to.

During the discussion of the resolution, Sovereign Commander Fraser being in the chair, some members insisted that Woodmen of the World should retain 51 per cent. of the stock to be sold to W. O. W. In an extended colloquy between the Sovereign Commander and two delegates, the Sovereign Commander adroitly maintained his position against any change. In one statement, he said: "It is so safeguarded that this Sovereign Camp at all times controls the new company on a ratio of two to one. So I think it is safeguarded at least 200 per cent. because it is a two to one proposition in favor of the Sovereign Camp."

An amendment to the committee's resolution was offered, to the effect that the Sovereign Camp "shall retain at least 51 per cent. of the capital stock of this new corporation." The Sovereign Commander stated, "If I were not in the chair, I would make an amendment that they own 100 per cent." A point of order was made against the amendment and sustained by the Sovereign Commander. The delegate stated: "I change my amendment, then, that it sell no more than 49 per cent. of the stock of this corporation." Sovereign Commander: "Who is it going to sell it to?" Delegate: "The present members of the Woodmen of the World." Sovereign Commander: "Sup-

posing we cannot supply the demand?" Delegate: "Don't sell but 49 per cent. and prorate it out." Sovereign Commander: "I am sorry you have not had confidence in the Sovereign officers." Sovereign Commander: "Let me tell you that in the time that I have run the affairs of this organization I have brought it up from an insolvent wreck until it is the richest in the world. There has never been a dollar lost in this society, and never will be, in my judgment, no matter who is presiding over it, because I believe the great membership of this organization are able and keen enough to select men who are both honest and capable."

The resolution was adopted and the executive officers at once proceeded actively to bring about the organization of the Insurance Company.

The only information or notice which the members at large of the W. O. W. had or could have had of this proceeding, so far as the record shows, was the publication of the proceedings of the Sovereign Camp in "Sovereign Visitor," a paper published and mailed monthly to members. The only purported account of the proceedings, given in the "Sovereign Visitor," aside from an article republished from the "Los Angeles News," relating to the matter in question, is as follows: "Monday, June 13. Sovereign Commander Fraser outlined a program for this special meeting, appointed certain committees, taking a recess until" the next day. "June 16. The committee on Sovereign Commander Fraser's report submitted its report, which was discussed pro and con, taking the entire morning. The committee offered resolution commending very favorably the entire report. Sovereign Lecturer, A. G. Matthews, spoke at great length on the Sovereign Commander's report. The entire executive board of Sovereign officers was reelected for four years—till 1931. Sovereign Commander Fraser thanked the delegates for the esteem and confidence bestowed on the officers, hoping that the present progress and prosperity would keep on and on for all time."

The "Los Angeles News" article was preceded by misleading headlines in large type, in these words: "SOVEREIGN CAMP TAKES ACTION TO WRITE ANY KIND OF INSURANCE POLICY." That article appeared in the "Sovereign Visitor" on a page other than that upon which the purported proceedings of the Camp were given. That publication was at least ambiguous, if not also deceptive. Its purport was that the plan of the Commander "for a commercial insurance company with capital and surplus of $2,000,000 for members and under the joint control of the Pacific Woodmen Life Association and W. O. W., was adopted. The stock is to be purchased by the association and resold to its members on demand. The name of the company will be announced later. Directors of the Pacific-Woodmen Life Insurance Association and W. O. W. * * * directors will administer the affairs of the new combination."

The articles of incorporation of the Insurance Company were filed in Delaware October 31, 1927, and, so far as advised, this was not known to W. O. W. members except those who were actively engaged in its organization and perhaps a few of their personal friends and supporters. They were filed in Nebraska November 14, 1927. There is nothing to show that the plaintiffs, or W. O. W. members generally, knew that. The only evidence having probative force that the plaintiffs, or any others of the members at large except as above stated, had knowledge of the organization of the Insurance Company, what its articles of incorporation were, and what the organizing officers had done, was imparted by letter sent out by the Sovereign Commander on December 10, 1927, in which the members were given the privilege of buying stock in the Insurance Company until January 1, 1928.

We do not take into consideration the testimony relating to the lease and sale of the W. O. W. Building in Omaha.

Up to the trial of this case in the district court, the W. O. W. sold, of the capital stock it received in the Insur-

ance Company, $430,000 worth, $110,000 being to three persons named, and $320,000 worth to small purchases by members, leaving still on hand $1,570,000 worth. All purchasers of stock were members of W. O. W., some of whom were made members for that purpose.

Up until December 23, 1927, the Insurance Company wrote insurance amounting to $1,400,000, which increased to $3,200,000 by April 14, 1928. Premiums collected to January 1, 1928, were $10,677.20, and, from January 4, 1928, to April 18, 1928, $20,672.31, or a total of $31,349.51. How much of these premiums were collected up to December 23, 1927, is not disclosed.

Appellants' counsel offers this statement: "There was still plenty of time for the officers of the association to consider what safeguards were necessary, and it was entirely in their power to discuss and adopt safeguards to prevent the control of the Life Insurance Company from passing out of the hands of the Woodmen, either as an association, or of its members." This is a pregnant statement. It was likewise in their power to do otherwise. It, in effect, admits that no such safeguards existed up to then. The time to have considered "what safeguards were necessary" was before the $2,000,000 left the treasury of W. O. W. We do not understand why there was so much aversion, at the Sovereign Camp meeting in June, to a provision in the articles of incorporation of the Insurance Company to retain 51 per cent. of the stock. In the words of Ben Johnson, "The dignity of truth is lost with much protesting."

It is contended by appellants that, as the only "restrictions in our law upon the activities of these societies, except as may apply to the citizens generally," are statutory, the burden is "upon plaintiffs to point out what section * * * was violated." We do not accept this as a correct statement. The act of the legislature, exempting fraternals from general insurance laws, gave them no additional powers. The effect was to deprive them of business powers incident to corporations generally and to with-

hold all except indwelling, declared powers. *Scott v. Bankers Union*, 73 Kan. 575. Every act of the legislature, in and subsequent to 1887, clearly indicate that such societies could transact business "for the sole (mutual) benefit of its members and their beneficiaries, and not for profit," which is significant and all-controlling. General business exploits and activities of such associations are manifestly excluded. No one could seriously contend that W. O. W. possessed authority to go into a foreign jurisdiction, organize a foreign corporation, controlled by foreign laws, and then escort such corporation into Nebraska solely for the purpose of having it do what W. O. W. could not, and did not, believe it had a right to do directly. The claimed purpose of organizing the Insurance Company as a subsidiary helpmeet of W. O. W. is devoid of candor and rectitude, in face of the record made by the officers themselves, who left it easily within their transient and ephemeral power to sell every share of stock subscribed for by W. O. W., whereby everything claimed as a justification of their acts could be lost. There is no tie between W. O. W. and the Insurance Company which can be preserved by law. It does not even limit potentialities to present officers. They extend to future officers who have not been so boundlessly trusted.

It is said: "The new company (is) to act as a subsidiary to the Woodmen of the World, and to cooperate with it in the insurance field." "Subsidiary" means an "inferior portion or capacity." Just how the Delaware corporation can be said to be inferior to W. O. W., with a majority of its board of directors made up of officers of W. O. W., which board of directors may delegate to two or more persons its power, is not plain. By what reasoning can it be determined, in advance, which corporation may, and how soon, end in an inferior position? The whole movement so far has been toward benefiting the Delaware corporation to the full measure of its entire capital stock at the expense of W. O. W., and reveals something new as a stock-selling scheme.

There is no doubt that W. O. W. would over-leap its powers if it undertook a legal reserve life insurance business under its present articles, constitution and laws. The resolution of the committee, endorsing the plans of the Sovereign Commander, disclosed that he was urging the organization of a company whose capital stock "shall be subscribed by this association," all of which "shall be sold to the members of this association, except such few shares as are necessary to be held by the persons acting as incorporators of said company." The corporation, which was organized by the officers of W. O. W., not only failed to make any reference to that, but the Insurance Company board of directors was authorized to make and alter its own by-laws, or by resolution, so that "two or more of their number to (would) constitute an executive committee" which shall have "and exercise any or all of the powers of the board of directors in the management of the business and affairs of this corporation."

There were other provisions in these articles authorizing the board of directors (executive committee) to refuse stockholders access to its corporate books and records, denying them such right except it be conferred by law or by resolution of the board of directors or stockholders.

That part of the resolution of the Sovereign Camp which required 14 of its officers to be always on the board of directors of the Insurance Company has not been carried out. There are no safeguards in favor of the W. O. W. to protect its property, funds and interest. The Insurance Company is wholly independent of W. O. W. as a legal entity. The net results of the transaction so far is the throwing of $2,000,000 of property and assets of the W. O. W. into the lap of the Insurance Company. It is true that, as conditions stood at the time of the trial of this case, it was in the power of the officers of W. O. W. to refrain from selling a majority of the Insurance Company's stock. It is true, Mr. Fraser testified he had no intention of selling more than 49 per cent. Such skeleton

is a trifling prop. Many doors are left open through which the Insurance Company can pass to gain complete control of its organization, to the exclusion of W. O. W., regardless of the resolution of June, 1927, one of which is a provision in its certificates of stock: "No stockholder may sell or transfer his stock or this certificate until said stock has been offered to the company for sale at the market price, and, if there is no market price, then at book value. If the company does not find a purchaser for said stock within 15 days, the holder may sell and legally transfer the same." What power does W. O. W. have over its members to compel them to hold stock in any corporation?

With an energetic campaign, the Insurance Company could acquire a majority of its stock in its own hands, or in the hands of friends or dummies, and elect its board of directors without naming one member or one officer of W. O. W.

Later in this opinion, in discussing the question of investment, attention will be called to the fact that, under the articles of incorporation of the Insurance Company, there was almost no limit to the kinds of business which it was authorized to transact, and that W. O. W. did not possess authority to engage in any one mentioned except to invest in some of the securities enumerated.

Until the passing of the June resolution, we find no instance where the W. O. W. assumed or claimed power to organize independent corporations, or to conduct an old line business for profit, having no thought of benevolence or brotherly love. The resolution itself was in violation of the articles of incorporation, constitution and laws of the order, which the laws of Nebraska required to be filed with the state. In no sense was it an amendment to its articles. Were it such, it would be void. Had the constitution and laws provided for conducting a business for profit, it would have been void, as opposed to its articles of incorporation and the statutes of Nebraska, if not section 1, art. XII of the Constitution of the state. The resolution itself, being a nullity, affords no protection to any one.

Fraternal insurance orders seem to have been favored because of their benevolent, rather than commercial, pretensions, and they should be confined to their chosen field or remove the shield by changing their form of government, as provided by law they may do.

Counsel gave three illustrations of the use of its surplus funds, to wit, constructing and endowing a tuberculosis hospital, maintaining a uniform rank where members are drilled in encampments, and its Omaha radio station. They might be justified as aiding the health of, and wholesome entertainment for, its members, and legitimate advertising. We see no connection between the W. O. W. and the Insurance Company to justify a claim that the Insurance Company is an incident to conducting fraternal insurance.

Counsel very aptly state that the legislature was familiar with the situation. We doubt if history records an instance where a fraternal, incorporated or otherwise, ever attempted to do what is attempted here, without some statutory authority. Mr. Bradshaw, chief counsel for W. O. W., testified he never heard of such. Up to this time, no fraternal has so attempted to abuse its conceded and quite well-understood privileges as to call for legislation. Existing laws will control that until the legislature otherwise provides. To follow out the extraordinary claims, made for W. O. W., to their ultimate conclusion, it could create a corporation to buy and operate almost every business in Nebraska, under the pretext of hiring clerks who would give it business, by joining the order with the privilege of purchasing stock in its corporation.

The officers of W. O. W. and the Sovereign Camp knew they could not write old line insurance and, because of that, set up a circumbendibus to outwit the law. W. O. W. possessed power to assess and draw money from its members for two general purposes only—to pay benefits and necessary operating expenses.

We reach the conclusion that the resolution passed by Sovereign Camp in June, 1927, at Los Angeles, was void

and contrary to the laws of the state of Nebraska, its own articles of incorporation, constitution and laws, and public policy. It could not confer authority upon any of its officers to organize an old line insurance company. We are pressed to this conclusion from the nature of the business W. O. W. was incorporated to perform; limitations implied by law upon fraternal benefit associations; interpretations by the associations themselves and hundreds of thousands of their members; and the public policy of the state, manifested by the administration of insurance corporations, and further indicated by the two acts of the legislature in 1925 and 1927, affording to such associations an opportunity to write other classes of insurance, upon conditions prescribed.

This brings us to the question of W. O. W.'s power to invest. It has been discussed with force that the provision in section 95 (a), Constitution and Laws of W. O. W., saying officers "may make such other investments as may be at any time authorized by the Sovereign Camp," justifies the organization, and subscription to stock, of insurance companies as an investment.

Aside from the fact that the law does not so regard it, it is hardly compatible with the spirit of the resolution which suggests that the officers of W. O. W. shall sell all of the stock to its members, except such few shares as are necessary to go to the incorporators. The purpose of organizing W. O. W. was not to seek investments to be sold to its members on demand, but to benefit them in the spirit of fraternalism and brotherly love, by giving them insurance within the reach of men and women desiring to protect their beneficiaries, such as its articles of incorporation, constitution and laws permit. Even though it be said that stocks of a going corporation may be the subject of investment, the following authorities justify the conclusion that subscriptions for stock, in the organization of a new corporation, cannot be regarded as an investment. *Anglo-American Land Mortgage & Agency Co. v. Lombard*, 132 Fed. 721; *DeLaVergne Refrigerating Ma-*

chine Co. v. German Savings Institution, 175 U. S. 40; 2 Fletcher, Ency. of Corporations, 2071, sec. 1119; *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673, 53 Atl. 842; *McAlester Mfg. Co. v. Florence Cotton & Iron Co.*, 128 Ala. 240, 30 So. 632; 14-A C. J. sec. 2129; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; 1 Thompson, Corporations (2d ed.) 792, sec. 652; *Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1; *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unof.) 888.

If W. O. W. could transact the business with its own means which the Insurance Company was organized to conduct, a debate, that purchasing its stock is an investment, would be more pardonable. This court has held, in *Allison v. Fidelity Mutual Fire Ins. Co.*, 81 Neb. 494, that a mutual fire insurance company has no power to write reinsurance. It would naturally follow that such company could not with its own means incorporate another company which could reinsure.

Appellants contend that the law pertaining to ordinary corporations and mutual insurance companies does not apply to fraternals. That may be admitted as a general proposition, but we are holding in this case that a fraternal cannot transact business which is foreign to its avowed purposes in accordance with the statutes of the state. That being true, the general principles of law relating to that subject are applicable to all corporations. Aside from that, section 95 of the constitution and by-laws of W. O. W. prescribes what investments shall be made.

The effect of this transaction was to put $2,000,000 belonging to W. O. W. at work to finance a Delaware corporation, the articles of which authorize it to transact many kinds of business, such as all kinds of insurance, reinsure and coinsure, own and sell certain enumerated securities, to manufacture, hold, own, mortgage, pledge, sell, transfer and dispose of, and to deal and trade in goods, wares, merchandise and personal property; to acquire good will, rights and property; to guarantee, purchase or acquire, hold, sell or assign shares of capital stock or evidences of

indebtedness created by other corporations; to deal in licenses, patents, inventions, improvements, processes, formulas, trade-names; to make and perform contracts of every kind for any lawful purpose without limit; to make, accept, indorse or discount notes, drafts, bills of exchange, warrants, debentures and other negotiable instruments; to issue bonds, debentures or obligations; to carry on any other business, and other miscellaneous powers. Not one of those powers is within the leap of a fraternal insurance order as prescribed by the laws of the state of Nebraska or the constitution and laws of W. O. W. The adroit argument of appellants' counsel that the legislature has not conferred powers on fraternal associations, such as a grant or franchise, but assumes a "state of affairs" only "imposing regulations upon them," and does not purport to grant them all the powers which they may use, is disposed of by what has already been said.

It was not until the articles of incorporation were filed in Nebraska, November 14, 1927, that members could know what was going to be, and what had been, done. What was published in the August "Sovereign Visitor" gave no account of the plans. The publication in the "Visitor" of the "Los Angeles News" article was not enlightening, and was not published as—indeed, did not purport to be—a comprehensive report of the Camp proceedings. Had members read the resolution, its provisions would have advised them that the Sovereign Executive officers would attend to "details" necessary to protect W. O. W., in having "at all times fourteen" of "not to exceed twenty-one members" of the board of directors of the Insurance Company, which was never done.

The next effort to notify members of what had been done was a letter, dated December 10, 1927, extending to them the privilege of buying stock until January 1, 1928. There is no such limitation in the resolution. There must have been some underlying purpose.

This suit was filed December 23, 1927, thirteen days after the letter was mailed to members.

At no time were the members given adequate explanations of where the scheme might land. The same men were at the helm for W. O. W. and the proposed Insurance Company from and after June 16, 1927. They contracted with themselves. They were left alone to keep their own counsels, without supervision. "What has he to do with contracts who can command, who is master by nature, who comes on the scene with * * * demeanor?" Those who plead laches are the same who stood behind their tenacious barricade of seclusion and now solicit immunity because not discovered with sufficient alacrity to ward off the blows of legal acrobats. We are not prepared to say, as a matter of law, plaintiffs are precluded by their own laches to maintain this suit, but do conclude, as a matter of fact, they are not.

We own to the rule that laches, the creature of equity, will prevent relief, after the consummation of an *ultra vires* act, even though it be technically expedient and proper, where, to grant it will occasion the public great inconvenience and the defendant serious loss, if the plaintiff can be readily compensated in damages. Courts will balance equities and, where they are equal or predominate against him who seeks relief, equity will follow that rule. So far as appears, there are but few policyholders, who took insurance prior to this suit, to be affected, some of whom were aware of the situation. Men may not interject themselves into, or intermeddle with, situations to aid wrongdoing, and escape the consequences.

Aside from what has been said, it appears that, before complete connections can be made to tie the W. O. W. and Insurance Company together, something more must be done.

In balancing equities, we must take into consideration the good that may be done to those who have been wronged, against the evil that may befall innocent persons. The plaintiffs sued, not only for themselves, but for all those members of W. O. W. who are similarly situated, who

are carrying insurance in about the sum of $750,000,000, as they had the right to do under section 8543, Comp. St. 1922. Section 95, Constitution and Laws of W. O. W., provides: "When funds have accumulated not immediately needed to pay the obligations of the association," they "may be used for the payment of benefits and monument obligations," and that, "if the uninvested fund on hand, together with said one instalment of assessment and beneficiary funds on hand, are not sufficient to pay such approved beneficiary and monument obligations, then the Sovereign Commander and Sovereign Clerk shall convert so much of the invested fund into money as may be sufficient to meet the excess of losses over that which the said one instalment of assessment, together with the beneficiary fund and uninvested funds on hand, will pay, which shall be transferred to and placed in the beneficiary fund." That means that the $2,000,000 expended to incorporate the Insurance Company, being in excess of W. O. W.'s needs as a surplus, could have been transferred to the beneficiary fund to relieve the members of an assessment to raise that amount.

If W. O. W. receives back the $2,000,000, it will not be injured. If the Insurance Company is required to pay back $2,000,000, it cannot complain, since it knew all about the unlawful act by which W. O. W. transferred $2,000,000 of its funds. The officers of both corporations engineered and transacted the whole deal, which imparts knowledge to them of everything that had transpired.

As to stock resold to members of W. O. W. by W. O. W., such purchasers are in no position to claim innocence. They were members of W. O. W., or they could not have properly purchased the stock. Their membership in W. O. W. imparted notice to them of the constitution and laws of W. O. W., and they must know the law relating to fraternals in Nebraska. We fail to see where any legal or equitable injustice can befall W. O. W., Insurance Company, or members of W. O. W. who purchased with knowledge.

There remains the equities of those who took insurance in Insurance Company. Some of the members of W. O. W. who purchased stock took insurance in the Insurance Company, either to themselves or group insurance on persons in their employ. Such policyholders are without equity. Who the other policyholders are, and when they purchased their policies, are not disclosed by the record. Insurance Company received premiums amounting to $10,677.20 up to January 1, 1928. How much of that sum was received before the commencement of this suit, we do not know. From January 4, 1928, until April 18, 1928, it received premiums amounting to $20,672.31, making a total of $31,-349.51. When the equities are so overwhelming in favor of the members of W. O. W., of the W. O. W. itself, certain of its policyholders and members who purchased its stock, and against Insurance Company, we are not disposed to find such injuries to innocent parties, if there be such, as to deny equitable relief. We may add that we have no knowledge as to who are the parties denominated innocent policyholders, in so far as the record discloses. Of this we are quite certain: That a large part of the premiums were paid for policies by persons who had knowledge of sufficient facts, by virtue of their membership in W. O. W. and of their early participation in the plans of organizing the Insurance Company, as to leave the number of innocent policyholders, if any, in doubt.

It is claimed that the plaintiffs may not maintain this action because they have sued W. O. W. and its officers in violation of section 57 "Eighth," Constitution and Laws of W. O. W. We need give little attention to this point, since this action is brought against W. O. W. and its officers because of the resolution of June, 1927, purporting to authorize the officers to organize the Insurance Company. There is no appeal from acts of the Sovereign Camp. Aside from that, this record shows a state of affairs which is conclusive, to our minds, that, had the plaintiff waited until the scheduled Sovereign Camp meeting in February, 1928, their complaint would have fallen on deaf ears, and the law does

not require the doing of idle things. Moreover, had plaintiffs waited until February, 1928, they would have been confronted with intervening possibilities which might have arisen to confound them far beyond what appellants now claim should result in their defeat in this suit.

What we have already said disposes of the question of *ultra vires*.

On the question of consolidation under the act of the legislature of 1925, we say: In the instant case, there is no pretense that W. O. W. attempted to consolidate or reinsure, or that the method of consolidation therein provided was ever thought of. In appellants' brief, it is said: "Until authorized by law, fraternals were not allowed to consolidate." This is quite a concession, in the face of the other contention that W. O. W. was free to do as it pleased, by virtue of being a self-governing legislative organization. Again, in appellants' brief: "The W. O. W. was attempting, by organizing the Globe Life Insurance Company, to extend its operations." That being true, it was attempting to indirectly write old line insurance, which it could not do directly without first embracing the general insurance laws of the state, by methods provided by law. The test to be applied here is the misuse of W. O. W.'s funds, and not its right to consolidate with an existing company. If it had been the purpose of the officers of W. O. W. to either consolidate or organize another company, why were not the provisions of those acts followed, or attempted to be followed? There is in no sense a consolidation. Members owning stock in the Insurance Company can dispose of it as they please, provided they first offer it to the Insurance Company. This position is reinforced by a frank admission in appellants' brief: "It must be admitted that the fraternal society in this case did not make a direct attempt to comply with the 1925 law, since its officers and governing body were convinced that they had authority to do what they did do, by reason of the general provision and policy of the law, giving fraternals, through their representative body, wide latitude in investments."

Under no definition of the word "consolidation" do the facts before us fit. Both corporations are acting under laws of different states, under different charters, names, management, kinds of business and officers; and any business they transact with each other is as much subject to future arrangement as though nothing had been done tending to form ties between them.

There was no consolidation, either by a new and distinct corporation; the absorption of one by the other; issuing shares in one to the shareholders in the other in exchange; making one company the holder of all in the other company, or by regarding the united shareholders of both companies as shareholders in each corporation, acting under similar charters and under the same management, so as to bring about consolidation, merger or amalgamation, as suggested in *Tod v. Kentucky Union Land Co.*, 57 Fed. 47, cited by appellants.

We do not think authorities cited, holding that one profit corporation may buy stock in a similar corporation, are in point; nor do we think this is a case involving laches or estoppel, as in *Leininger v. North American Nat. Life Ins. Co.*, 115 Neb. 801. In that case, there was a transformation of a mutual to a stock company, confessedly under specific acts of the legislature prescribing the course to be followed. Every move was a substantial compliance with law, which provided an appeal by aggrieved members. After the transaction was fully completed and no appeal taken, suit was commenced to unscramble the egg. In the instant case, we have a corporation taking funds from W. O. W. for its entire capital stock, without authority of law, and launching its own separate business, with such credit and standing as it could secure from persons doing business with it. Its obligations are its own. It makes its own contracts, to meet which it pledged its own credit. Its policyholders could not look to W. O. W. or its members for payment of money that W. O. W. could not divert therefor. It received money from the officers of the W. O. W. who could not ratify such acts. Those

who dealt with the Insurance Company must look to it alone. We do not pretend to dissolve the Insurance Company or create anew the W. O. W.; nor do we separate that which has never been joined.

We have examined all of the propositions of law urged by appellants, and have read many of the citations following each, and find nothing in them to lead us to a different conclusion than herein expressed.

The only remaining question for consideration is whether there has been error in the amount of the decree. We think the decree, when properly construed, does not prejudice any of the defendants. It seems to require nothing more than a complete restoration of cash and securities, according to the necessities of the occasion and the facts.

The decree of the district court should be and is

AFFIRMED.

MARGARETHA CATHERINE OHLE GOOS, APPELLANT, V. KARL BROCKS ET AL., APPELLANTS: MATHEW A. SCHOLL ET AL., APPELLEES.

FILED JANUARY 10, 1929. No. 26730.

1. **Treaties: CONSTRUCTION.** Ordinarily, the provisions of treaties should be given a liberal rather than a narrow construction.
2. **Aliens: RIGHT OF INHERITANCE.** Article 14 of the treaty with Prussia, concluded in May, 1828, and article 7 of the treaty with Hamburg, concluded in December, 1827, when given a liberal interpretation, confer on subjects of the contracting provinces or states the right to inherit real estate situate in the United States from a citizen of this country when such right would be conferred by state statute but for their alienage.
3. ———: ———. Where the rights of nonresident aliens to an inheritance have vested under provisions of a treaty, such rights will not be affected by the subsequent suspension or abrogation of the treaty.
4. **Treaties: EFFECT OF WAR.** A state of war between the parties to a treaty will operate to abrogate only such of its provisions as are incompatible with a state of war.
5. **Aliens: RIGHT OF INHERITANCE: EFFECT OF WAR.** The treaty

right of a nonresident alien to inherit lands situated in the United States is not incompatible with, nor abrogated by, a state of war between this country and the other contracting power.

APPEAL from the district court for Adams county: LEWIS H. BLACKLEDGE, and J. W. JAMES, JUDGES. *Reversed, with directions.*

Tibbets, Lambe & Hewitt and *Detjen & Detjen*, for appellants.

O. S. Spillman, Attorney General, Paul E. Boslaugh, E. P. Nuss and *Pierce & Simmons, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

This appeal arises out of an action to partition lands in Adams county and involves the right of nonresident aliens to inherit land in the state of Nebraska. The parties to the original action claim to be the owners of the land as next of kin and heirs at law of Fred Ohle, who died, intestate, October 23, 1917, seised of the lands in controversy, and leaving him surviving no widow, issue or parent. In the partition action there was an order confirming the shares of the parties, ordering partition, the appointment of a referee, and, upon his report, a sale ordered and had. The purchasers paid one-fourth of the purchase price at the time of the bid. The parties moved for a confirmation of the sale and for a distribution of the proceeds. Thereupon, the purchasers filed a petition in which they asked that the sale be vacated and that they be released from their bid and for a refund of the money paid by them. The ground on which the purchasers sought to vacate the sale and be released from their bid was that the parties to the action were nonresident aliens and were incapable of inheriting the lands in question; that, therefore, they had no title and no title could be given the purchasers.

The trial court found and determined that the parties to the action were nonresident aliens and were incapable of inheriting the lands from Ohle, and vacated the sale and released the purchasers from their bid. All of the parties to the original partition proceeding have appealed. After the appeal was lodged in this court, the state of Nebraska, having first obtained leave, intervened and claims title to the real estate by escheat, upon the ground that Ohle left no kindred capable of inheriting. The facts are not in dispute. The original parties to the action were, at the time of the death of Mr. Ohle, nonresident aliens and citizens of the then empire of Germany. At the time of Ohle's death a state of war existed between the United States and the German Empire.

At common law nonresident aliens were incapable of inheriting land. At the time Mr. Ohle died, section 6273, Rev. St. 1913, was in force. That section provides: "Nonresident aliens * * * are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided."

It will thus be seen that under the common law and statutes nonresident aliens were incapable of inheriting, unless such right was secured to them by a superior power. The Constitution of the United States makes treaties, entered into between the United States and other nations, the supreme law of the land, and such treaties, when made and ratified, will override or render nugatory for the time being any statute of a state to the contrary on matters which may be lawfully the subject of a treaty. That the right of nonresident aliens to inherit lands may be conferred by treaty has been recognized for many years.

In the instant case, the purchasers at the partition sale and the intervener contend that the declaration of war, on the part of the United States, against Germany, occurring April 6, 1917, operated to abrogate any treaty rights of the subjects of Germany being nonresidents, to inherit

lands in the United States, and the intervener further contends that the treaties which existed at the time war was declared did not extend to or cover the right of a subject of Germany to inherit lands from a citizen of the United States. On the other hand, the appellants contend that the existing treaties between the United States and provinces which formed a part of the German Empire were sufficient to guarantee to them the right to inherit from a citizen of the United States, and also that the treaty provisions, respecting the right to inherit, were not abrogated by the fact that a state of war existed between the United States and the German Empire.

The treaty provisions on which the appellants rely are set out as follows: Article XIV of the treaty with Prussia, concluded in May, 1828, and promulgated March 14, 1829, among other things, provides: "The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction, on the part of the government of the respective States." Treaties and Conventions, vol. II, p. 1500.

Article VII of the treaty with Hamburg, concluded December 20, 1827, and promulgated January 2, 1828, among other things, provides: "The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, * * * and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all

duties of detraction on the part of the government of the respective States." Treaties and Conventions, vol. I, p. 903.

Article X of the treaty with the German Empire, concluded December 11, 1871, and promulgated June 1, 1872, among other things, provides: "In case of the death of any citizen of Germany in the United States, or of any citizen of the United States in the German Empire, without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular office of the nation to which the deceased belongs of the circumstance, in order that the necessary information may be immediately forwarded to parties interested. * * * In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised." Treaties and Conventions, vol. I, p. 553.

The intervener contends that the provisions of the treaties above set out were not intended to control the devolution of title to real estate from a citizen of the country in which it is situated, but only to control the right to inherit real estate from an alien owner residing in the country where the real estate is situated, and cites as supporting this view *Petersen v. Iowa*, 245 U. S. 170, 62 L. ed. 225; *Duus v. Brown*, 245 U. S. 176, 62 L. ed. 228; *Frederickson v. Louisiana*, 23 How. (U. S.) 445, 16 L. ed. 577; and other cases from state jurisdictions. An examination of all of these cases discloses that the opinions deal with the right of the state to impose succession or death taxes, and not to the right of aliens to inherit from citizens of this country. The authorities cited, therefore, are not in point on the question presented by the record in this case.

Accepted principles require a liberal rather than a narrow interpretation of the terms of treaties. *Jordan v. Tashiro*, 49 Sup. Ct. Rep. 47. Applying this principle of

interpretation, we think the treaty provisions above quoted clearly provide for, and guarantee to the subjects of the provinces of the German Empire, with which the treaties were concluded, the right to inherit real estate from a citizen of the United States, where such right would be conferred by state statute but for his alienage.

The principal question for determination is: Were the treaty provisions, relied upon by the next of kin of Fred Ohle, in force at the time of his death; or were they abrogated because of the then-existing state of war between this country and the German Empire?

Intervener and appellees invoke the rule announced in *Sullivan v. Kidd,* 254 U. S. 433, 65 L. ed. 344, namely: That the construction placed upon a treaty by the executive department of the federal government charged with the supervision of our foreign relations should be given much weight, and, as a basis for its application, cite the following letter:

"Department of State, Washington, March 21, 1923.
"Sir:

"The department has received your letter of March 10, 1923, requesting to be informed concerning the treaty of 1928 between the United States and Prussia.

"In reply, you are advised that this treaty is regarded as having been in force at the time of the declaration of the state of war between the United States and Germany.

"By the treaty concluded between the United States and Germany on August 25, 1921, to restore friendly relations between the two nations, Germany accords to the United States rights and advantages stipulated for its benefit under the treaty of Versailles, which has not been ratified by this government. Under article 289 of that treaty bilateral treaties with Germany concluded with each of the allied and associated powers are in effect declared abrogated and the right is accorded to each allied or associated power to revive by giving notice to Germany within a specified period any treaty or convention which it may

be desired to continue in effect. This government did not give notice within the period referred to in article 289 as extended by paragraph 5 of article 2 of the treaty between the United States and Germany of August, last, of its intention to revive the treaty of 1828 between the United States and Prussia and this treaty, therefore, is not regarded by the department as now being in force."

From this letter it will be observed that there is nothing to indicate that the federal department of state was holding that the treaty with Prussia was not in force in October, 1917, or that it was abrogated by the declaration of war between the United States and Germany. The inference is plain that the abrogation of the treaty was effected by the treaty of peace concluded between this country and Germany in August, 1921, and which adopted the provisions of the treaty of Versailles with certain exceptions. This treaty of peace was concluded long after the death of Ohle.

It is a well-established rule that wherever the rights of individuals have vested under provisions of a treaty they will not be affected by its subsequent suspension or abrogation. *Society for Propagation of the Gospel v. New Haven,* 8 Wheat. (U. S.) *464, 5 L. ed. 662. There is, therefore, no occasion for application of the rule announced in *Sullivan v. Kidd, supra.*

This brings us to the real problem presented by this appeal, viz.: Did the declaration of war against the German Empire operate to suspend or annul the provisions of the treaties with the German states hereinbefore quoted and which secure to the citizens of the German states the right to inherit real estate in this country? That a state of war between the contracting powers to treaties will operate to terminate some and not affect other treaty provisions is now generally recognized by practically all modern authorities. Treaty provisions for friendly commercial relations, for alliances, and, generally, of a political nature, are necessarily suspended or abrogated by a state of war between the contracting powers. Those treaty provisions

which fix national boundaries and which cede territory from one nation to another nation and which from their nature are intended to be permanent will remain in force unaffected by a state of war between the parties to such treaties.

After a careful examination of all the authorities cited in the able briefs of counsel and from a somewhat extended independent research of the authorities pertaining to the subject, we find the clearest and most comprehensive statement of the law in the opinion in *Techt v. Hughes*, 229 N. Y. 222, 11 A. L. R. 166, by that eminent jurist, Judge Cardozo. In the opinion in that case the authorities are extensively reviewed. The situation concerning the confused state of the authorities is set forth in the following apt language in the opinion:

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended *ipso facto* when war came. 3 Phillimore, International Law, 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, International Law, sec. 99; Hall, International Law, 398, 401; Fiore, International Law (Borchard's Translations) sec. 845. International law today does not preserve treaties or annul them regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. 'The whole question remains as yet unsettled.' Oppenheim, *supra*. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, 'dispositive' or 'transitory' conventions, survive. Hall, International Law, 398, 401; 2 Westlake, International Law, 34; Oppenheim, *supra*. So, of course, do treaties which regulate the conduct of hostilities. Hall, *supra;* 5 Moore, International

Law Dig. 372; *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. *464, *494; 5 L. ed. 662, 669.

"Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected.

"Treaties lose their efficacy in war only if their execution is incompatible with war. * * * Bluntschli, Droit International Codifié, sec. 538.

"That in substance was Kent's view, here as often in advance of the thought of his day: 'All those duties of which the exercise is not necessarily suspended by the war subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war that its efficacy becomes increased, from the increased necessity of it.' "

The following language from the opinion in *Techt v. Hughes, supra*, "That (treaty) provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected," we regard as stating a principle founded on logic and sound reason. It follows that the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war. This power has been exercised in the passage of the act providing for the appointment of a custodian of alien enemy property who by national legislation is authorized to seize and hold during the war all property

situated in this country and owned by alien enemies. Moreover, the federal government is vested with power to confiscate the property of alien enemies which may come into its possession. This nation has not found it necessary to resort to such drastic measures. It has adopted the more humane policy of restoring to the citizens of Germany their property which has been seized by the alien property custodian.

We therefore hold that the right to inherit lands conferred by the treaties involved is a provision that is compatible with, and is not abrogated by, a state of war between this country and the German empire.

A like question was presented to the supreme court of Kansas in the case of *State v. Reardon,* 120 Kan. 614, which involved one of the same treaties that is here in question. That court followed the rule laid down in *Techt v. Hughes, supra,* and held that citizens of the German empire were entitled to inherit from a citizen of the state of Kansas. We conclude that the next of kin of Fred Ohle, deceased, who resided within the German empire at the time of his decease, were entitled to and did inherit the lands in this action.

It follows that the judgment of the district court should be and is reversed, and the cause remanded, with directions to enter judgment in conformity with this opinion.

REVERSED.

HERBERT T. PEMBROOK V. STATE OF NEBRASKA.

FILED JANUARY 10, 1929. No. 26389.

1. **Homicide.** To justify a verdict of murder in the first degree, the information must charge, and the evidence must show beyond a reasonable doubt, the killing to have been done purposely, and with deliberate and premeditated malice.
2. ———. As thus used, "purposely" means intentionally, "deliberate" means maturely reflected, "premeditated" means conceived beforehand, and "malice" means a wilful or corrupt intention of the mind.

3. **Instructions** 2 and 3 considered, and *held* to be prejudicially erroneous.
4. **Record** examined and found without evidence to sustain a conviction of murder in either the first or second degree.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

C. L. Stewart and *Waring & Waring,* for plaintiff in error.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

At Harvard, in Clay county, in an altercation between one French and the plaintiff in error, hereinafter called defendant, in which such French was the aggressor, the latter was stabbed several times by defendant with the blade of a small pocket knife, from which wounds French died. An information was filed which, omitting formal parts, charged that: "Defendant, unlawfully, feloniously, purposely and of his premeditated malice, stabbed Herbert French with a knife, and as a result thereof he died September 19, 1927. Defendant, Herbert T. Pembrook, thus committed murder in the first degree." To this information defendant interposed a plea of not guilty. Trial was had, jury instructed as to first and second degree murder, and manslaughter, and defendant found guilty of murder in the second degree and sentenced to imprisonment for twenty years; to reverse which judgment he prosecutes error.

At the threshhold of every case stands the question of jurisdiction, which should be first to receive the trial court's consideration. The above indicated three offenses are specifically defined in the Compiled Statutes of Nebraska for 1922, and, so far as material, are as follows:

"Section 9544. Whoever shall purposely and of deliberate and premeditated malice * * * kill another * * * shall be deemed guilty of murder in the first degree.

"Section 9545. Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another * * * shall be deemed guilty of murder in the second degree.

"Section 9546. Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter."

In these enactments the legislature was dealing with the most sacred and highly prized rights of mankind—life and liberty. This it must have realized at the time, as by carefully selected words it restricted the application of each quoted statute to those persons coming clearly within its provisions. Hence, in construing such enactments as quoted, each word should be considered as material and permitted its full force and effect.

The unbroken holdings of this court have been that, in charging these crimes, the pleader must follow the words of the above statutes, or use their equivalent. In harmony with this rule, and in furtherance of uniformity and dispatch, in *Nichols v. State,* 109 Neb. 335, under a statute authorizing this court to establish rules, we promulgated a plain, succinct form charging murder in the first degree, as a guide to bench and bar. This form was followed in the instant case, except that the words "deliberate and" which appear in such form between the words "of his" and "premeditated" are, as we have seen, omitted.

At the trial the court, in instruction 1, described the charge against the defendant by including therein that part of the information hereinbefore quoted. Instruction 2 informed the jury: "The charge against the defendant as made in said information covers and includes three different grades or degrees of the offense commonly termed 'homicide,' which is the unlawful killing of another person. These degrees are termed, 'murder in the first degree,'

'murder in the second degree,' and 'manslaughter.'" And further appearing in such instruction is practically a reiteration of the aforesaid quoted sections. This is followed by the challenged instruction 3, wherein the court undertook to define, for the enlightenment of the jury, the words "purposely," "deliberate," "premeditated," and "malice," as such words respectively are used in the statutes being considered; and in so doing, as we conclude, informed the jury that—"By the word 'purposely' is meant intentionally." That "deliberate" and "premeditated" "mean substantially the same thing and signify that the act to which they are applied is not suddenly and rashly done but has been planned or thought of beforehand." And further on in the same instruction informed the jury—"If a person has actually formed the purpose to kill, and has deliberated or premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree however short the time may have been between the forming of the purpose and its execution." As to "malice" the court stated to the jury that—"Malice, in law, signifies hatred or ill will; so that when one wilfully and without just cause or excuse does that which he knows will seriously injure another person it is then done with malice or maliciously." It should be said, however, that the above are but parts of this challenged instruction, and that in other parts thereof the elements of first and second degree murder and manslaughter are correctly reflected.

Thus, it becomes essential that we analyze instructions 1, 2, and 3, and the information. As well said in *State v. Mangano*, 77 N. J. Law, 544, 546, quoting with approval from *State v. Deliso*, 46 Vroom (N. J. Law) 808: "While the statute in its enumeration of the three mental states essential to murder in the first degree places the word 'wilful' (in our statute 'purposely') before 'deliberate' and 'premeditated,' these mental states normally succeed each other in the inverse order, premeditation, both as a mental process and by force of its prefix, necessarily preceding the weighing of the mental content that is implied by the

figurative term 'deliberate,' both of which must precede the acceptance by the will of the matter thus previously premeditated upon and weighed." As used in our statutes, "purposely" means intentionally, "deliberate" means maturely reflected, and "premeditated" means conceived beforehand. In defining "malice" the trial court gave the *common* acceptation of the term and designated it as the *legal* acceptation. While this was not necessarily reversible error, the better course would have been to have given the instruction approved by us in *Housh v. State*, 43 Neb. 163, 167, as follows:

" 'Malice,' in its legal sense, differs from the meaning which it bears in common speech. In common acceptation it signifies ill will, hatred, or revenge toward a particular individual. Such a condition of mind would, of course, constitute malice in the eye of the law, but such is not necessarily its legal sense. 'Malice,' in its legal sense, denotes that condition of mind which is manifested by the intentionally doing of a wrongful act without just cause or excuse. It means any wilful or corrupt intention of the mind."

Thus, we conclude that the trial court erred in instructing the jury, under the statutes here involved, that "deliberate" and "premeditated" mean substantially the same thing; also erred in the use of the word "or" in place of the word "and" in that part of instruction 3 wherein it is stated: "If a person has actually formed the purpose to kill, and has deliberated *or* premeditated upon it before he performs the act," etc.—thus reducing the scope of the statute as well as the amount of evidence necessary to a conviction; and further the court was incorrect in its definition of the term "malice."

This brings us to a consideration of the information, and incidentally instructions 1 and 2. Did the absence of the words "deliberate and" in such information render it ineffective to charge the crime of murder in the first degree? In *Simmerman v. State*, 14 Neb. 568, we announced the law to be: "To justify a verdict of murder in the first degree,

the evidence must show the killing to have been done not only *purposely,* but also with *deliberation* and *premeditation.*" If it is necessary to prove "*deliberation,*" then it is elementary that it is equally necessary that such word or its equivalent be properly alleged in the information and covered by an instruction. This conclusion finds support in *State v. Johnson,* 8 Ia. 525, which has been by that court unbrokenly followed and approved, wherein it is held: "An instruction on the trial of an indictment for murder, which omits the element of premeditation, in defining the crime of murder in the first degree, is erroneous." It follows that the information under consideration does not charge murder in the first degree. It further follows that this necessarily renders prejudicially erroneous the giving of instruction No. 2 so far as it applies to murder in the first degree.

Further, we find the record is without proof to sustain a conviction of murder, either in the first or second degree. Thus, the giving of instruction 2 as to murder in the first and second degree was prejudicially erroneous. *Botsch v. State,* 43 Neb. 501; *Whitehead v. State,* 115 Neb. 143. Also, as French, the deceased, conceived and planned the fatal meeting, and was the aggressor at the start of the altercation, it might be advisable to say we do not want to be understood as holding that this record reflects sufficient evidence to warrant a conviction of the crime of manslaughter; and as a re-trial may be had, neither do we think it wise to discuss the indicated facts, notwithstanding we have read with care the entire record.

This renders it unnecessary to consider the other claimed errors.

The judgment of the trial court is reversed and the cause remanded.

REVERSED.

JOSEPH J. MULLIGAN, APPELLEE, V. IRA C. SNAVELY ET AL., APPELLEES: THOMAS WOLFE, APPELLANT: DAVID G. WINE ET AL., CROSS-APPELLANTS.

FILED JANUARY 10, 1929. No. 25774.

1. **Mortgages:** NOTICE. Actual notice of the existence of an instrument affecting title to real estate is as binding as constructive notice by the record.
2. ———: ———. One who by himself or his agent has examined the record, or an abstract (so far as the same is correct) of title purporting to be taken therefrom, is charged with actual notice of what the record contains, not only of such matters as are properly of record, but also of instruments not entitled to record but appearing thereon; and in such case the effect of the record as constructive notice is immaterial.
3. ———: ———: FALSE STATEMENT IN ABSTRACT. A subsequent purchaser or mortgagee can take no benefit from a false statement in an abstract of title, but may rely upon such abstract to the extent that it correctly reflects the record.
4. ———: ———: RECORD. One charged with actual notice of what a record contains is entitled to the benefit of such facts appearing thereon which are to his advantage, and may rely upon the validity of all instruments which do not disclose facts impeaching them or putting him upon inquiry.
5. **Deeds:** UNWITNESSED DEED: VALIDITY. A deed or other instrument required by statute to be witnessed, though not witnessed, is nevertheless valid between the parties and as against all others except creditors and subsequent purchasers or mortgagees in good faith, if otherwise unobjectionable.
6. **Mortgages:** RELEASE: SUBSEQUENT MORTGAGEE. A subsequent mortgagee in good faith, having no notice of an assignment of the debt secured by a prior mortgage, may rely upon a release of said prior mortgage executed by the prior mortgagee of record, of which he has actual or constructive notice.
7. ———: ASSIGNMENT. An assignment of a real estate mortgage, securing a negotiable promissory note, to the indorsee of such note, is an instrument affecting the title to real estate within the meaning of the recording acts.
8. ———: ———: PRIORITIES. A subsequent mortgagee upon whom no duty rests to pay a prior mortgage, and who in good faith relies upon a release thereof executed by the mortgagee, has a superior equity to an assignee of such prior mortgage

whose assignment is not of record, and of which he had no knowledge, nor of any facts sufficient to put him upon inquiry. Especially is this true where the assignee knew of the negotiations for a new mortgage and kept silent, though under the belief induced by the fraud of his assignor that his assignment was of record, the subsequent mortgagee not being a party to such fraud.

9. Quære. Whether or not a release of a real estate mortgage requires a subscribing witness, or whether the signature of the notary (in whose presence the document was signed) to the certificate of acknowledgment is a sufficient witnessing, not decided.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Roper & Fuller, for appellant.

Meeker & Anderson, T. B. Dysart, Scott & Scott and *Cordeal, Colfer & Russell, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This case was originally presented to Commission No. 1, an opinion written and adopted by this court, affirming the judgment of the court below; a motion for rehearing was filed and arguments heard thereon by the court. The same will now be disposed of. The action is to foreclose a mortgage upon lands, and the only question presented is the priority of liens.

The plaintiff, Joseph J. Mulligan, is the assignee of a mortgage originally executed by Ira C. Snavely and wife to the Peters Trust Company of Omaha, for the sum of $10,000, upon 1,200 acres of land, dated August 1, 1918, and recorded August 7, 1918, at 9 o'clock a. m., upon the records of Chase county, where the land was situated.

The defendant Thomas Wolfe filed a cross-petition seeking foreclosure of a mortgage dated March 1, 1918, and recorded the same day, for $18,000, executed by the Snave-

lys to one David G. Wine, the note which it secured having been indorsed by said Wine to Wolfe about the day of its date, as collateral security for certain indebtedness of Wine to Wolfe. It was agreed that an assignment of the mortgage should be executed and filed for record by Wine for Wolfe, but this was never done. The defendants David G. Wine and Farmers & Merchants Bank of Imperial filed a joint answer and cross-petition seeking the foreclosure of a mortgage for $17,636.75, executed January 5, 1921, by the Snavelys to Wine, which, with the note it secured, were held by the bank as collateral security for an indebtedness of Wine. It was alleged that Wine's debt to Wolfe and the $18,000 mortgage had been fully paid, and Wine and the bank claim a lien second only to that of the Peters mortgage. The defendant Harley G. Humphrey purchased a part of the lands from the Snavelys subject to a portion of the Peters mortgage, which he agreed to pay, and filed his answer and cross-petition asking that the remaining lands not covered by his deed be first exhausted to pay the prior liens. The allegations of the several answers and cross-petitions are put in issue by replies. The decree of the district court established the Peters mortgage as a first lien, the $18,000 mortgage as a second lien, in favor of Wolfe, except as to the Humphrey lands, and the Wine mortgage for $17,636.75, a third lien in favor of the bank. Wolfe appeals, and Wine, the bank and the Humphreys file cross-appeals.

The fruitful cause of the litigation involved was the failure of Wolfe to obtain an assignment of the $18,000 mortgage and file the same for record, whereby it was made possible for the Peters Trust Company to make the loan secured by its mortgage, the circumstances of which we will now relate. Early in July negotiations were instituted by Snavely and Wine to procure a loan of $10,000 from the Peters Trust Company on the lands covered by the $18,000 mortgage, which culminated, August 1, 1918, in the execution of the note and mortgage of the plaintiff. Wolfe had knowledge of these negotiations, and there is

written evidence in a letter signed by Wolfe tending to prove that Wine had Wolfe's authority to collect the $18,000 mortgage. The transaction was carried out and completed in the customary manner with loan companies as follows: The note and mortgage were executed by the Snavelys to the trust company August 1, 1918, and were sent to Chase county for record, and recorded at 9 o'clock a. m. August 7. At the same hour and date a release of the $18,000 mortgage was recorded, executed by David G. Wine, the record holder thereof. There was no subscribing witness to this release at the place upon the instrument provided therefor, but it was properly acknowledged before a notary public who testified that Wine executed the same in his presence. The evidence does not establish which one of these documents was actually first filed for record, but at the top of the release appears in pencil the figure "1," and at the top of the mortgage the figure "2," which is the customary method by the recording officer of indicating the order of filing. The abstract was then extended to show these filings, and submitted to the plaintiff which approved the same, and thereafter the money was paid to the mortgagor Snavely or his order. It seems that $5,080 was paid to Wine on account of the $18,000 mortgage, the application of the remainder not shown.

Upon this state of facts, the plaintiff takes the position that it relied upon the recorded release of the $18,000 mortgage, having no notice of the fact that the note secured thereby had been assigned to Wolfe, and that therefore it was an innocent mortgagee and entitled to priority.

On the other hand, defendant Wolfe contends that, because the release did not have a subscribing witness as required by statute, it was not entitled to record, and therefore did not impart constructive notice upon which plaintiff might rely. To this plaintiff replies (1) that the instrument in question did not require a witness under the statute, and (2), if it did so require, that the signature of the notary to the acknowledgment, coupled with the fact that the instrument was executed by Wine in his presence,

was a sufficient compliance as to witnessing; (3) "any irregularities in the execution, which was actually recorded, would not be known by those relying on the record until the record was inspected and then the instrument, as actually recorded, would be actual notice of its existence to the person who saw the record."

These questions—the necessity for witness, the sufficiency of the notary's signature, whether the instrument was entitled to record, and whether it imparted constructive notice—are exceedingly interesting and are learnedly and exhaustively discussed in the briefs, the major portions of which are devoted to that purpose; but after the most careful consideration we are convinced that their decision is not requisite to a proper disposition of the case, which presents a state of facts involving not constructive, but actual, notice.

The object of recording instruments affecting real estate is to secure a permanent record of the title and provide a place where persons dealing with the property may inform themselves as to the condition of the title. The record, when regularly made, is constructive notice to the world of what it contains. All persons dealing with the land are conclusively presumed to have knowledge of it and are bound thereby. The purpose of the record, so far as third persons are concerned, is to give notice to those who have it not. Persons who have knowledge of the facts disclosed by the record are bound by their knowledge, and the constructive notice by record adds nothing and is immaterial. "Actual knowledge of the existence of a real estate mortgage is as binding as constructive notice thereof." *Bradford v. Anderson,* 60 Neb. 368. Where a grantee reads a deed, he has actual, not constructive, notice of its contents. *Jones v. Woodward,* 50 Okla. 704.

So far as the question of notice is concerned, it seems to be conceded that, if the release in question was entitled to record so as to impart constructive notice, plaintiff would have been protected thereby, as distinctly held in *Whipple v. Fowler,* 41 Neb. 675. But it is contended by

defendant, supported by reasoning which to us is not persuasive, that, though plaintiff might rely upon a record regularly made, he is not entitled to rely to the same extent, upon the same facts appearing of record and brought to his attention in some other manner. If I purchase land with actual knowledge of the existence thereon of an unrecorded mortgage, I buy subject thereto. If I purchase land after having examined the records, and having found recorded therein a deed from my grantor of the same lands to a third party, which deed was not properly witnessed and therefore not entitled to record, I buy subject to the rights of the prior grantee, not because of the record of the defective deed, but because of my actual knowledge of its existence derived from the record. One who actually sees the record of an instrument is bound by his knowledge thus acquired, regardless of the question whether such instrument was entitled to record.

The principles above stated are well established and are applicable to the situation of plaintiff so far as the question of record and notice are concerned. The abstract of the land in question was submitted to the plaintiff and passed upon by it before the loan was consummated by the payment of the money. That abstract showed the release in question, but erroneously stated that it was properly witnessed. Of course, plaintiff could take no benefit from the false statement in the abstract, except upon the question of his good faith. But one error did not vitiate the entire abstract, and he may rely upon it to the extent that it correctly reflects the record. In this instance it showed at least a release properly acknowledged by the apparent holder of the mortgage, and, upon examination by plaintiff's attorney or agent, imparted actual knowledge of the existence of the instrument. True, the plaintiff did not examine the record itself, but a properly exemplified copy is of equal effect. One with actual notice of a written instrument good between the parties is in no position to raise the point of defective execution, but takes subject to it.

Russum v. Wanser, 53 Md. 92; *Johnston v. Canby,* 29 Md. 211; *Gardner, Dexter & Co. v. Moore, Trimble & Co.,* 51 Ga. 268, holding: "A mortgage of real estate attested by but one witness is not void, and, if a subsequent mortgagee or purchaser buys or takes his mortgage with actual notice of a prior mortgage, he takes subject to it even though it have but one witness." One with actual notice is not affected by failure to record. *National Mutual Building & Loan Ass'n v. Blair,* 98 Va. 490. We are clearly of the opinion that the plaintiff had the same right to rely upon its actual knowledge of the existence of the release to the same extent that it might rely upon constructive notice furnished by an instrument regularly recorded.

Defendant Wolfe, however, makes the further contention that under no circumstances is plaintiff entitled to rely upon the release in question, executed by the mortgagee, without requiring the production of the negotiable note secured by the mortgage; that, inasmuch as the plaintiff has not brought itself within the rule of protection by the recording act, it became its duty to satisfy itself by proper inquiry that the indebtedness secured by the mortgage had been paid. He cites two cases from other states: *Northup v. Reese,* 68 Fla. 451, and *Early Co. v. Williams,* 135 Tenn. 249, but in these states an assignment of a mortgage is not required to be recorded in order to protect subsequent purchasers and mortgagees. He also cites *Griffith v. Salleng,* 54 Neb. 362. In that case it was held that a purchaser of land subject to a mortgage, who subsequently paid the mortgage debt to the mortgagee, holder of the note with negotiable coupons attached, taking a release from the mortgagee, was not protected against the assignee of prior coupons which were due but unpaid. The case of *Whipple v. Fowler,* 41 Neb. 675, was cited by the plaintiff and distinguished by the court in the following language: "That case is not at all in point. It was there held that one who bought relying on a release of a mortgage, on record and executed by the mortgagee, was protected against the mortgage although it had been assigned

to another and the original mortgagee had no right to release it. In this case Smith bought with the mortgage standing of record, unreleased, and merely assumed that, when he found the principal bond in the possession of a third person, he was safe in paying that third person, without inquiring what had become of the negotiable interest coupons." The case is authority merely for the proposition that, where a person undertakes to pay a prior incumbrance, he is bound to pay it to the right party. Also *Heintz v. Klebba*, 5 Neb. (Unof.) 289. The syllabus in that case is as follows: "One who purchases real estate incumbered by a recorded mortgage securing negotiable notes and receives along with his deed an unrecorded release of the mortgage, executed by the mortgagee after he had sold the notes and assigned the mortgage, cannot resist a foreclosure by a *bona fide* holder of the unpaid secured notes." In the opinion the case of *Whipple v. Fowler, supra*, was discussed, and, while intimating that the holding therein was upon a question not involved, conceded that the rule as announced is just and reaffirmed in many subsequent cases. The facts upon which such holding was predicated are set forth in the opinion: "We are of the opinion that where a sister mortgages real estate to her brother, who then sells the mortgage debt to a stranger and thereafter executes a release of the mortgage, and the sister afterwards conveys the mortgaged property to her parents, the burden of proof in an action by the owner of the debt to foreclose the mortgage will rest upon the parents to show that they bought and fully paid for the property without notice of the want of authority in the mortgagee to release the mortgage." And after referring to the rule in *Whipple v. Fowler, supra*, Commissioner Glanville, who wrote the opinion, remarked: "While the rule is just, we do not think it relieves the purchaser of the burden of proving that he is within the rule in a contest with the holder of the unsatisfied lien; and surely where the relationship of the parties is as shown in this case, the burden of proving good faith, and all the

elements required to bring the purchaser within the rule, is upon the appellees and they cannot prevail because plaintiff failed to prove they were not within the rule." The commissioner cited the case of *Whitney v. Lowe*, 59 Neb. 87, but in that case the release was not executed until the day following the purchase. Also *Bridges & White v. Bidwell*, 20 Neb. 185, holding that a purchaser from a mortgagee who had acquired the equity of redemption by deed from the mortgagors was not protected where the mortgage appeared unreleased and upon the record. Here the release was executed and filed before loan was paid over. Also *Mathews v. Jones*, 47 Neb. 616. A purchaser under similar conditions as in the case last cited was held not protected against a mortgage properly recorded, but in that case the deed from the mortgagor to the mortgagee contained a clause by which the grantee assumed and agreed to pay the indebtedness secured by the mortgage, which implied the continued existence of the security. While the rule announced in *Heintz v. Klebba, supra*, was proper as applied to the peculiar relationship of the parties involved, we do not think it controlling in this case.

The rule announced in *Whipple v. Fowler*, 41 Neb. 675, is as follows: "A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or *bona fide* purchaser, of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized; but as to all other persons the lien of the mortgage will not be impaired." The rule as thus stated has been approved and applied in many subsequent cases, among which are the following: *Cram v. Cotrell*, 48 Neb. 646; *Cheshire Provident Institution v. Gibson*, 2 Neb. (Unof.) 392; *Columbia Nat. Bank v. Marshall*, 2 Neb. (Unof.) 790; *Perry v. Baker*, 61 Neb. 841.

A distinction must be taken between cases where the purchaser buys property incumbered by a mortgage and

subsequently attempts to pay off the incumbrance. Such were *Ames v. Miller*, 65 Neb. 204, *Eggert v. Beyer*, 43 Neb. 711, *Snell v. Margritz*, 64 Neb. 6, and *Griffith v. Salleng*, 54 Neb. 362. Or cases where the subsequent incumbrancer agrees to apply the proceeds of the lien in payment of the prior incumbrance, as in *Porter v. Ourada*, 51 Neb. 510. In such cases there is no doubt that a duty is imposed upon the purchaser or subsequent incumbrancer to pay the right party, and if he pays the mortgagor or mortgagee without securing the evidence of indebtedness he does so at his peril. In the instant case the plaintiff's mortgage was not to be subject to the prior incumbrance which, prior to the payment of the money loaned, appeared to have been released by the record owner. Much stress is laid upon the fact that the release and plaintiff's mortgage were filed for record at the same time, and it is thence argued that plaintiff could not have relied upon the release; and in this connection attention is called to the fact that the mortgage is dated August 1, at a time when the prior mortgage appeared unreleased upon the record; but this is all explained by the manner in which the transaction was closed, the money loaned not being paid over until the release was executed and filed. We have held in two cases that, where the release and deed were executed and recorded on the same day as a part of the same transaction, the purchaser was protected by the release. *Cram v. Cotrell*, 48 Neb. 646, and *Columbia Nat. Bank v. Marshall*, 2 Neb. (Unof.) 790. In the *Cram* case the rule was stated: "Where the mortgage debt has been assigned, a purchaser in good faith without notice of the assignment will be protected by a release of the mortgage executed by the original mortgagee."

In the present case no duty rested upon the plaintiff to pay off the prior incumbrance. The duty was upon the borrower to clear the property of liens so that plaintiff's lien should be first. This he did by presenting a release from the mortgagee, Wine, upon which plaintiff relied.

The defendant, conceding that he was guilty of laches

in not procuring an assignment of the mortgage and having it recorded, insists that such laches are balanced by those of the plaintiff in failing to inquire as to the ownership of the note secured by the $18,000 mortgage, and procuring it to be delivered up and canceled, and that therefore the mortgages will be enforced in the order of their respective dates. We think this question has been disposed of by our observations as to the duty of the plaintiff in that regard. However, in *Ames v. Miller,* 65 Neb. 204, where the debt had been assigned but no assignment of the mortgage recorded and the purchaser took title from the mortgagee holding both the legal title and the mortgage, so far as the record showed, it was said by Holcomb, J., at page 213: "The plaintiff (the assignee), because of his failure and neglect to record the assignment of his mortgage, has lost his right to enforce his mortgage lien on the premises described therein as against the purchaser of such real estate. This, as between the parties, gives to the purchaser the superior equity, to which we think he is entitled." In that case it was also held that an assignment of a real estate mortgage was an instrument affecting the title to real estate within the meaning of the recording acts.

We think the principle that, where one of two innocent parties must suffer a loss, he whose negligence caused the injury shall bear the loss is applicable here. *Porter v. Ourada,* 51 Neb. 510; *Deleski v. Peters Trust Co.,* 115 Neb. 547. As we have above remarked, the failure of Wolfe to procure and record an assignment afforded Wine the opportunity of defrauding plaintiff by the execution of an unauthorized release, and under the circumstances Wolfe should bear the loss. The fraud of Wine in not executing and recording the assignment cannot be charged to plaintiff.

It is contended by the plaintiff and the cross-complainants, Farmers & Merchants Bank and the Humphreys, that the debt of Wine to Wolfe has been fully paid, and evidence tending to establish that contention was introduced, as

well as evidence to the contrary. There is such a conflict in the evidence on this point that we feel justified in taking into consideration the finding of the district court, who saw the witnesses and was in much better position than the reviewing court to weigh the evidence. His finding on this point was in favor of Wolfe and will be sustained.

We conclude that the decree of the district court and the former judgment of this court are right. The motion for rehearing is overruled and the former judgment adhered to.

AFFIRMED.

IN RE ESTATE OF HIRAM L. SMITH. ELWIN W. SHERRARD, APPELLANT, V. CHARLES H. SLOAN ET AL., EXECUTORS, APPELLEES.

FILED JANUARY 10, 1929. No. 26173.

1. Wills. Relevant portions of a will set out in the opinion construed.
2. ———: CONSTRUCTION. When it becomes necessary to construe a will, the entire instrument will be considered, and if, from its language, the intention of the testator can be ascertained, such decree will be entered as best effectuates the intention therein expressed. *In re Estate of Vandeveer*, 110 Neb. 651.
3. ———: DIVESTMENT: CONDITION SUBSEQUENT. A provision in a codicil to a will, that no devisee shall be a beneficiary who is addicted to the excessive use of intoxicating liquors or harmful drugs, is a valid condition subsequent, and may operate to devest an estate which had vested under a prior devise.
4. ———: ———. Where an interest in lands is vested in the devisee, subject to be devested in case certain conditions are not performed, the executors being given authority to determine the fact of such performance, the right of the devisee to the possession and income derived from the lands will be withheld until conditions performed, if such appears to have been the intention of the testator.
5. ———: CONSTRUCTION. Where an irreconcilable repugnancy exists between two provisions of a will, the later will prevail over the earlier, unless from a consideration of the entire will a contrary intention is evinced.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring and *Cline & Williams*, for appellant.

Sloans, Keenan & Corbitt, contra.

Heard before GOSS, C. J., THOMPSON and EBERLY, JJ. and STALMASTER and REDICK, District Judges.

REDICK, District Judge.

This action involves the construction of the will of Hiram L. Smith, and presents but one question, namely, whether the income, rents and profits of the share bequeathed and devised to the appellant, Elwin W. Sherrard, shall be paid over to him by the executors before his arrival at the age of 35 years, he now being aged 21. The county court, and, upon appeal, the district court for Fillmore county, held that he was not entitled to receive the income until he reached the age of 35, and he brings the case here for review.

The will in question, with two codicils, is quite lengthy, and we do not consider it necessary to set it forth *in extenso*, but will quote such portions as are relevant to the question for decision.

After the formal parts and providing for some legacies, the will provided as follows:

"5th. I give, bequeath and devise unto my well-loved grandchildren, Mrs. Bess Butler Wilson, Newell Butler, and Dorothy Butler, and to the infant child of my deceased granddaughter, Mrs. Maud Butler Sherrard, the 800 acres owned by me in Geneva township, Fillmore county, Nebraska, and more fully described as follows: The north half (N½) of section twenty (20); the northwest quarter (NW¼) of section twenty-one (21); and the south half (S½) of section twenty-eight (28); all being in town seven (7) north, range three (3) west of the 6th P. M. in Fillmore county, Nebraska, according to the government survey, to be theirs absolutely, share and share alike as ten-

ants in common; subject to the possessory right hereinafter granted to my trustees hereinafter named, until said trust is fully executed or said trustees duly discharged; and subject further to the condition that the devises herein granted shall not vest and ripen until each of the said legatees shall reach the age of twenty-one (21) years, and if any of said devisees shall die before reaching the age of 21 years, leaving no lawful issue of his, or her body, then the share of such devisee so deceased shall pass to and vest in the surviving of my said grandchildren or greatgrandchild; but if such devisee so deceased shall leave lawful issue of his, or her body, then I direct that the share of such deceased devisee shall pass to such lawful issue by right of representation.

"6th. All the rest and residue of my estate, real, personal, and mixed, together with the rents and profits, use and benefits, and full legal possession of the lands devised in paragraph five (5) hereof, I hereby set apart and constitute the same as a trust fund and estate, to be created, collected and governed, used and expended as follows:"

Then follow the appointment of trustees and instructions as to their duties, including the following:

"(c) That the said trust fund and estate shall be used, expended and applied as follows:

"(1) In the payment of the taxes and legal assessments on the property so held in trust. In the payment of the necessary costs of necessary and proper repairs and insurance upon said property, so that the same shall be kept in good reasonable condition and free from loss or waste thereon."

The will then provides for the establishment of a "Ladies Home" at Orland in the state of Indiana. This bequest was revoked by the first codicil and in lieu thereof a pension fund of $30,000 was provided for the benefit of certain classes residing in and within a radius of ten miles of the town of Orland.

"7th. All the rest, residue and remainder of my estate,

real, personal and mixed, I give and bequeath unto my lawful heirs, my son Curtis Adams Smith, and Hattie Smith Butler, of Geneva, Nebraska, to be theirs absolutely, share and share alike, subject to the possessory rights heretofore granted to my said trustees in said property, but the rights of possession and the rents and profits therefrom, in my said heirs, is deferred until all the charges, bequests and trusts in my will provided have been fully met and complied with."

"15th. I further direct that my said trustees, during the time that the amounts of the bequests herein provided for are accumulating, that such funds shall be kept safely invested in interest bearing and readily disposable securities, so that the funds so on hand shall not lie idle, but shall add to the said trust fund by the interest earned on such funds as they accrue in the hands of my said trustees. But in the loaning of such funds care to be exercised and the safety of the principal to be carefully guarded rather than to attempt to secure a specially large rate of interest."

The will was dated January 3, 1911, and on March 12, 1913, a codicil was executed revoking one of the bequests of a legacy and that for the establishment of a Ladies Home as above stated, and containing the following:

"Third. Having now arrived at the age of eighty-four years, and having seen a great many men, and having observed the effect upon them, their health, and fortunes, of the excessive use of intoxicating liquors, it is my desire and will that no person shall be a beneficiary under this will of mine who shall use intoxicating liquors as a beverage, and while I do not regard myself as perfect in any respect, yet I have never regretted my own course of life in this respect. I hereby direct, authorize, and empower my executors hereinafter named to withhold and absolutely deny any person named or referred to in my will who shall not for a period of not less than five years next preceding the time for distribution wholly abstain from the use of intoxicating liquors as a beverage. And should any of the

said beneficiaries be adjudged by my said executors to have within such period used intoxicating liquors as a beverage, then they shall cause such person or persons interest in my estate to lapse and become a part of my general estate for the benefit of my other heirs and legatees."

The appellees were appointed executors and provision made for the filling of vacancies.

On June 24, 1915, a second codicil was executed containing the following provisions:

"First. I hereby direct that my executors named in my will, or those that may succeed them or any of them, to fully inform themselves concerning the personal habits and practices of each and every legatee or devisee under my will, with special reference to whether they or any of them have subsequently to this date, and before delivering unto him, her, or them, a share or any part of my estate, used intoxicating liquors or harmful drugs to the extent of intemperance or excess. That my said executors or a majority of them shall be the judge of that fact, and if my said executors shall find that any such heir or devisee has within the period above mentioned indulged in the use of intoxicating liquors or such harmful drugs to the extent of intemperance or excess, then the said heir or devisee shall forfeit all right to receive any share or portion of my estate, real, personal or mixed, and that such share or portion so forfeited shall lapse, and become a part of my general estate, to be divided according to the terms of my will relating to the residue of my estate after paying expense of administration, my just debts, discharge of my trust imposed, payment of bequests and compliance with all other special bequests or devises in said will provided.

"Second. I further specifically will and direct that should any bequest or devise made by me to any of my heirs or devisees become complete upon the settlement of my estate and such devisee or heir shall not have attained the age of 35 years, then and in that case or cases I direct that said share be controlled by my executors named in my will or their successors, for the benefit of such heir or

devisee until he, she or they shall have attained the age of 35 years. It is further provided that if the real estate devised to any of my heirs should through legal process be converted into money, or if my representatives hereinbefore referred to shall deem it for the best interest of such devisees or heirs to convert such real estate into money, then and in that event the proceeds thereof shall be immediately invested in good Fillmore county, Nebraska, farming lands, or securities thereon, to be held for such heirs or devisees, until he, she or they shall have attained the age of 35 years."

The will then contained a special provision for the building of a home for appellant upon a tract of 40 acres upon condition that said tract be conveyed by appellant's father to said Elwin, such conveyance to contain a provision that title "shall remain in him inalienable and incapable of incumbrance until he shall reach the age of thirty-five years."

The object to be obtained by the construction of a will is to discover the intention of the testator, and when this is made clear, it is the duty of the court to effectuate such intention and enforce the will according to its terms. The intention of the testator must be found in the words used by him, giving them their general meaning in preference to any technical significance which may have attached to them by legal usage, in case of conflict. As stated by many decisions, it is the duty of the court to take the will by its four corners and from a critical consideration of the entire will determine the testator's intention. 40 Cyc. 1389. If the language of the will is ambiguous or uncertain and capable of more than one construction, the court may then consider the relationship existing between the testator and the objects of his bounty and the surrounding circumstances at the time the will was made and any other facts having a tendency to throw any light upon the testator's intention.

We think the will in question makes use of words and language which clearly indicate the intention of the testator. The will and codicils together constitute the last

will of the deceased and must be construed as one document, excluding such earlier portions as have been canceled or revoked by later provisions. The construction of deeds and wills differs in this respect, that, where inconsistencies exist between different portions of the document, the prior provision controls in case of a deed, but the last provision in case of a will. *Martley v. Martley*, 77 Neb. 163.

It follows, as conceded by the parties, to which construction we agree, that although by the provisions of the fifth paragraph of the main will the estate thereby devised to appellant vested in him upon his arrival at the age of 21 years, it was subject to be devested upon some condition or the happening of some contingency provided for by later clauses. In fact, it is agreed by all that appellant took a vested estate upon arrival at 21, subject to be devested in case he should not attain the age of 35, or if during a period of five years prior to his arrival at the age of 35 he had become addicted to the use of intoxicating liquors or harmful drugs to the extent of intemperance or excess. That a vested estate may be devested by a condition subsequent, see, *Smith v. Smith*, 64 Neb. 563.

This being the true position, the question for determination is whether or not appellant is entitled to receive the income and profits of the estate during the period between the ages of 21 and 35. The appellant strongly maintains the affirmative of this proposition, basing his argument principally upon that portion of the second paragraph of the second codicil which is in the following language:

"Second. I further specifically will and direct that should any bequest or devise made by me to any of my heirs or devisees become complete upon the settlement of my estate and such devisee or heir shall not have attained the age of 35 years, then in that case or cases I direct that said share be controlled by my executors named in my will or their successors, *for the benefit of such heir or devisee* until he, she or they shall have attained the age of 35 years."

The argument of counsel is that the words "for the benefit of such heir or devisee" mean the same as the expression "for the use and benefit of such heir or devisee," and he cites a number of cases to that effect and holding that under either expression the devisee is entitled to the income during the period prior to the happening of the condition or contingency imposed. The decisions cited probably state the correct rule of law as applied to those cases as follows: "The general rule is that, if a bequest of a residue vests subject to be devested on the happening of a contingency, the first legatee is entitled to receive the income accruing until the contingency happens, *unless a different intention on the part of the testator appears*" (italics ours)—citing a number of cases, the quotation being taken from *Wright v. White,* 136 Mass. 470.

It thus is seen that the question still remains whether the general meaning of the phrase in question is controlled by other provisions of the will. We think it is.

By the sixth provision above quoted the rents and profits of the lands devised in paragraph five are set apart as a trust fund for the establishment of a ladies home at Orland. This might have deferred the right of the devisee to possession to a period beyond his arrival at the age of 21. True, this bequest was revoked, but another one was substituted therefor, the creation of a fund for pensions, which might have postponed the right of possession for an indefinite period, to wit, until the last pensioner had been provided for.

Again, by the seventh paragraph the shares of the residuary legatees were made subject to the possessory rights of the trustees, and their rights to the possession and rents and profits were deferred until all charges, bequests and trusts had been complied with. While this clause does not include the share of applicant in the 800 acres, it has a bearing upon testator's intention. Also by the fifteenth paragraph the testator directed that—"During the time that the amounts of the bequests herein provided for are accumulating, that such funds shall be kept safely invested

in interest bearing and readily disposable securities, so that the funds so on hand shall not lie idle, but shall add to the said trust fund by the interest earned on such funds as they accrue in the hands of my said trustees."

In paragraph third of the first codicil the following language appears: "It is my desire and will that no person shall be a beneficiary under this will of mine who shall use intoxicating liquors as a beverage." And the following: "I hereby direct, authorize, and empower my executors hereinafter named to withhold and absolutely deny any person named or referred to in my will who shall not for a period of not less than five years next preceding the time for distribution wholly abstain from the use of intoxicating liquors as a beverage. And should any of the said beneficiaries be adjudged by my said executors to have within such period used intoxicating liquors as a beverage, then they shall cause such person or persons interest in my estate to lapse and become a part of my general estate for the benefit of my other heirs and legatees." And paragraph "first," above quoted, of the second codicil places the duty upon the executors to inform themselves as to the personal habits of every devisee with special reference to whether he used intoxicating liquors or harmful drugs to the extent of intemperance or excess, "before delivering unto him, her, or them, a share or any part of my estate;" and if in the judgment of the executors such devisee has been so addicted within the period above mentioned, he "shall forfeit all right to receive any share or portion of my estate," and provides for the lapse of such share into the general estate.

Does it appear from the language of these provisions that the testator had a different intention than that which would be ordinarily inferred from the use of the words "for the benefit of such heir or devisee until he, she or they shall have attained the age of 35 years," appearing in the second paragraph of the last codicil? The answer must be in the affirmative. The testator recites the knowledge gained by him during an active life of 84 years, of

the ravages, distress and loss occasioned by the excessive use of intoxicating liquors and harmful drugs, and it was his evident intention to protect his devisees, as far as he was able, from the calamities resulting from the habits denounced, until such time, as in his judgment, they had attained an age when their own experience and years would probably render them immune from the dangers and temptations of youth in connection with those particular matters. That it was testator's intention that appellant should not have control of any part of his devise until arrival at age 35 is further indicated by the provision for building him a house upon condition that the deed to the 40 acres should contain a provision against alienation or incumbrance until that time. The necessity for this provision is not apparent if devisee was to receive full control of the income of his devise at 21. Appellant contends that there is no express provision for accumulation of interest and income, and that the word "share" as used in the second paragraph of the second codicil must be construed as having reference to the corpus only of the devise. This may be conceded considering this paragraph by itself, but when read in connection with other clauses of the will, as we must do, it is evident, as above stated, that it was the intention of the testator that no person should be a "beneficiary under this will," or have delivered unto him "a share or *any part* of my estate," who was a victim of the habits denounced. And it is specifically provided that such person "shall forfeit all right to receive any share *or portion* of my estate," and that such person's "interest in my estate shall lapse" and become a part of the general estate. The language quoted permits of but one interpretation, viz., that such person shall be excluded from any share, part, portion and interest in the estate. The greater includes the less, and the context clearly implies that the word "share" in the second paragraph was intended to include the income by providing that, if the devise became complete before the arrival of devisee at 35 years of age, the control should be in the executors. What reason for

such control, unless to secure the carrying out of testator's intention to exclude certain devisees from all participation in his estate unless the condition subsequent was complied with?

The "first" and "second" clauses of the last codicil are not inconsistent. The "first" provides the condition upon which the devisee may take, and the "second," that until arrival at 35 years the executors shall control.

It is argued by appellant that under the construction we have adopted, "if the 'heir' should die any time before his thirty-fifth birthday, the 'heir' would never receive any benefit of the devise or legacy." It may be true that appellant, in such event, would receive no benefit; but whether true, or whether appellant's heirs would be cut off, we need not determine at this time. Cases of this kind must be determined from the language of the particular instrument involved, and decisions upon the construction of other wills are of little value except as to the general principles of construction. We have examined the cases cited by appellant and they are not applicable to the peculiar provisions of the will in question.

A testator has a right to dispose of his property in any manner he sees fit and to attach any conditions to its possession and enjoyment, provided no positive rule of law or public policy is infringed; and, as before stated, it is the duty of the courts to enforce the will of the testator, under the above limitations, in accordance with his intention as expressed by the words used.

The judgment of the district court is right and is

AFFIRMED.

MAY MCCANN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 10, 1929. No. 26217.

1. Carriers: EVIDENCE: SUDDEN STOPPING OF STREET CAR. In an action for personal injuries claimed to have resulted from an

unusual and violent stopping of the car in which plaintiff was a passenger, it is competent, when the proper foundation is laid, for a witness to state that he had, in his experience, never known a street car to stop as violently as in the instant case. While the evidence is in the nature of a conclusion, it is within the exception that, where all of the facts cannot be presented to the jury, such conclusion may be given.

2. **Appeal**: HARMLESS ERROR. In such case, where witness said she only knew of one other case of a stop so violent, it was error to permit her to state where it was, that being immaterial, but in this case without prejudice.

3. **Evidence**: METHOD OF STOPPING STREET CAR. In an action by a passenger for damages resulting from the violent and unusual stopping of a street car at a certain place, it is competent for a properly qualified witness to testify as to the proper method of bringing the car to a smooth stop, though he had not operated cars on the particular line where the accident occurred.

4. **Trial**: DIRECTION OF VERDICT. Where the evidence is conflicting, but sufficient to sustain a verdict for either party, a motion for a directed verdict is properly overruled.

5. **Carriers**: INJURY TO PASSENGER: PROOF OF NEGLIGENCE. In an action by a passenger for damages against a street railway company, it is not sufficient for plaintiff to show merely that he was injured by a jerking or lurching of the car; he must go further and show that the jerking or lurching was of such an unusual character as to warrant an inference of negligent handling of the car, or that it was attributable to some act of negligence shown.

6. **New Trial**: REMITTITUR. Where a verdict is excessive, but not so much so as to indicate passion and prejudice on the part of the jury, the error may be corrected by a remittitur.

7. **Appeal**: REMITTITUR: DISCRETION OF COURT. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not, ordinarily, be reversed, unless an abuse of discretion is shown, for the reason that the trial court is in a better position to determine that question than a court of review.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John L. Webster and *R. B. Hasselquist,* for appellant.

Smith, Schall, Howell & Sheehan, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This action is brought for damages for personal injury to plaintiff while a passenger on one of the street cars of defendant. The petition alleges that about 10 o'clock a. m., on April 21, 1926, the plaintiff was a passenger on defendant's car, and, desiring to alight at Sixteenth and Farnam streets, she signaled the car to stop and arose from her seat and proceeded toward the front exit, and, while in the exercise of due care on her part, defendant negligently stopped said car with a violent, sudden, unnecessary and unusual stop, in consequence of which plaintiff was thrown against the rear of the motorman's vestibule and to the floor of the car, whereby she was injured. The answer was a general denial. Case tried to a jury, which rendered a verdict of $11,050 for the plaintiff. Motion of defendant for new trial was overruled upon condition that plaintiff remit from the verdict the sum of $4,050, leaving it stand for $7,000. Plaintiff filed remittitur, and judgment rendered for plaintiff as ordered; to which order plaintiff and defendant each excepted. Defendant appealed to this court and plaintiff filed a cross-appeal.

Defendant presents seven assignments of error, the first two of which may be considered together.

Having shown that the plaintiff, Mrs. McCann, and a witness, Mrs. Wilbur, had been riding upon the street cars for many years in the city of Omaha, Mrs. McCann was asked whether she had ever known of or observed the car to stop as suddenly and abruptly as the car did when she was injured, to which she answered, "I never have." Substantially the same question was asked Mrs. Wilbur, a passenger on the car, and she answered, "At one other time, I remember." Question: "Where was it?" Answer:

"At the Boulevard and Cuming street" (a distant part of the city). Defendant contends that it was of no concern to the jury whether plaintiff ever observed a street car to stop as suddenly and abruptly "at any other time or any other place;" that the only question was whether there was a negligent stopping at the time and place of this particular accident. True, but it was not the purpose of the questions to show that negligent stops had been made at other times, but to show the character of stops in general for the purpose of proving that the instant stop was of a different character,—unusual and more violent. We think the evidence was competent for that purpose. The answer of Mrs. Wilbur that she had seen one other such stop was immaterial and would have been incompetent, if offered for the purpose of affording an inference of a negligent stop at the time in question from the fact of a previous negligent stop; but that was not the purpose. The witness could not truthfully answer the question in the negative without the qualification. The question, "Where was it?" was immaterial, and the objection to it should have been sustained, but we think the error was without prejudice. If the witness had answered the question, "Only on one other occasion," her evidence, so far as material, would have been substantially the same. Defendant did not move to strike the answer, and we think no prejudice resulted. The suggestion that it would have been equally competent to call an unlimited number of witnesses to testify to sudden and violent stops at other times and places, while correct as a general proposition, is inapplicable here because not attempted.

The third assignment has to do with the testimony of witness Goodrich. Having shown that the witness had been a motorman for the defendant company for about six years, some time prior to the accident, on other lines of defendant, upon which the grades of the streets were as steep or steeper than that on Farnam street approaching Sixteenth, he was asked to describe the usual manner of bringing a street car to a stop on the west side of Sixteenth

and Farnam, to which he answered: "If you had gradually applied your air and as you came to a stop you gradually released it to keep it from coming to a sudden stop." And in reply to the question, "What would be the probabilities as to whether or not that would bring that car to a sudden stop?" he answered, "That is, if you applied it and did not release it fast enough it would bring it to a sudden stop because your wheels would be locked." The argument here is that the witness never operated a car at the place of the accident, did not see it, and had no personal knowledge whether the street car was stopped with a sudden jerk; and it is therefore suggested that his testimony was conjectural and speculative. We think not. The purpose of the testimony was merely to show the usual manner of stopping cars whereby a smooth stop could be accomplished. The evidence had its application to the point in question as well as any other place on defendant's line, and was proper for the purpose of aiding the jury in determining whether or not the proper methods had been used in making the stop complained of.

Motorman Johnson, in charge of the car at the time of the accident, described the manner of stopping the car precisely, and, almost in the same language, identically with the witness Goodrich, and said he used that method and made a smooth stop without any violent jerk or lurch. Defendant contends that, inasmuch as the motorman testified that he used the method described by Goodrich, he was not guilty of negligence in stopping the street car. This takes for granted that the motorman's evidence was true, but this was a question for the jury upon all the evidence and circumstances. The evidence of Goodrich was competent.

The fourth assignment is the overruling of defendant's motion for a directed verdict, made at the close of all the evidence. The evidence of plaintiff and Mrs. Wilbur was to the effect that the stop in question was unusually violent. The defendant produced the motorman and con-

ductor and one passenger who testified that there was nothing unusual about the character of the stop, and another passenger that it stopped in the regular way so far as he knew, that he did not pay any attention to it. These witnesses for defendant also testified that they were not thrown by the stop; but the passengers were seated and the conductor at his usual place in the rear vestibule, and therefore not in position to be affected by a sudden stop. So far as there is a conflict in this testimony, we think it was a question for the jury, and that the court did not err in overruling defendant's motion. Defendant's principal contention on this point is that it is insufficient for the plaintiff merely to show that her injuries resulted from a jerk or lurch of the car, but that she must go further and trace the jerk to some negligent act of defendant; that the doctrine of *res ipsa loquitur* has no application, the mere happening of the accident not furnishing any inference of negligence. In support of the proposition he cites a number of cases, which we have examined, but they all presented the situation where nothing but a jerk or lurch, followed by injury to the plaintiff, was shown. Two of those cases call attention to the fact that no evidence was offered tending to prove that the jerk or lurch of the car was any greater than usual. *Ottinger v. Detroit United Railway*, 166 Mich. 106; *Faul v. North Jersey Street R. Co.*, 70 N. J. Law, 795, citing from *Burr v. Pennsylvania R. Co.*, 35 Vroom (N. J.) 30: "It was not until extraordinary lurching and violence was shown that negligence could be presumed." This distinguishes the cases cited from the present one where evidence was produced tending to prove the stop unusually violent.

In this connection defendant places considerable stress upon the testimony of the motorman Johnson of admissions by plaintiff: "Q. Did you have any other conversation? A. I asked her if she fell down while the car was in motion or when it stopped, and she didn't know; she said, 'I tripped myself stepping down to the floor.' She said, 'I must have tripped myself stepping down.' Q. Why did you

ask her that question? Did you expect that anybody had fallen when that car stopped? A. No. I even asked her if it was any fault of the car, and she said, 'No; she didn't think so.'" This was denied by plaintiff. Defendant argues that this proves that plaintiff's fall was not the fault of defendant, but in our judgment it only went to the weight of plaintiff's testimony, which was for the jury.

It is further argued that, where plaintiff's injuries may have been due to other causes than carrier's negligence, the fact of the accident does not authorize the inference of negligence, which must be drawn, not from the fact of injury, but from the circumstances under which it occurred. Assuming this to be a correct statement, it was for the jury to determine whether plaintiff received her injuries by tripping or in consequence of a negligent stop. If the jury were unable to determine between the two possible causes, they should, of course, find for defendant; but the evidence was sufficient to support a finding that the car was stopped with extraordinary violence.

The fifth assignment deals with the order of the court for a remittitur from the verdict, it being contended that the verdict was so excessive as to indicate passion and prejudice on the part of the jury, and that therefore the entire verdict should have been set aside and a new trial granted. It seems to be the general rule that a verdict of the character supposed cannot be corrected by remittitur, but should be set aside *in toto*. In this case the learned district court incorporated in his order a finding that in his judgment the verdict was not based upon passion and prejudice of the jury, but that it was clearly excessive to the extent named. In such case defendant, and plaintiff on her cross-appeal, contend that the court had no authority to reduce the verdict in this class of cases where no definite or specific rule exists for the assessment of damages; that it invades the province of the jury, and the court has no measure for determining the extent of the excess. No doubt many cases so hold, though the authorities seem to be quite

divided on the point. See New Trial, 15 Decennial Dig. sec. 162(3). The rule in this state will be discussed later. But the error, if any, on this particular point was favorable to defendant and under familiar rules was not prejudicial. So held in a case involving a remittitur. *Schroeder v. Mauzy,* 16 Cal. App. 443.

The sixth assignment attacks instruction No. 3 as authorizing the jury to find for the plaintiff regardless of any negligence on her part. This assignment was not argued, but is not well taken because there was no pleading of contributory negligence.

The last assignment is that the verdict, both before and after remittitur, is excessive and of itself indicates bias and prejudice of the jury. To recite in detail the evidence as to the injuries suffered by plaintiff would unduly prolong this opinion. It appears, however, according to her evidence, that she suffered a fracture of the left femur in the upper third thereof, which the surgeons experienced great difficulty in reducing, which was attempted without operation for about six weeks when, failing to secure proper apposition, a portion of the shin bone was taken from the right leg and inserted at the point of fracture, the final result being a very good bony union; her leg was placed in a cast and so remained for about nine weeks; she was confined to the hospital for over three months, could not sleep, had pain all over her body, lost 31 pounds in weight, and expended about $1,100 for doctors and hospital fees; that she still required the aid of crutches at the time of the trial, about a year after the accident, and experienced great difficulty in getting up and down stairs; that she had been keeping a boarding-house, doing all the work herself, and earning $100 a month net; that she was 54 years old, and had an expectancy of 18 years; that she is unable to carry on her business without assistance of her daughter and some hired help, her daughter having theretofore earned her own living; that she still suffers considerable pain when walking. It was shown by defendant that plaintiff has Paget's disease, a progressive deterioration of the

bone structure, which existed prior to the accident, but it is not shown to have been the cause thereof nor result of the same, though probably contributing in some degree to plaintiff's continued disability. While the amount fixed by the jury seems quite liberal, we have examined with care the evidence regarding plaintiff's injuries, including that of six or more doctors and surgeons, and are unable to conclude that it clearly appears that the verdict was the result of passion and prejudice, but concur in the finding of the district court on that point.

As permitted by the statute, plaintiff has filed a cross-appeal, and insists that the order of remittitur be set aside and judgment ordered for the full amount of the verdict, on the ground that the court had no authority to order a remittitur where the verdict is not so disproportionate as to disclose passion and prejudice, and cites *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, where the court held that the amount of the verdict was not so excessive as to call for a reversal of the judgment or to warrant any reduction by this court. The authority of the court to order a remittitur was not involved. Also *Dailey v. Sovereign Camp, W. O. W.*, 106 Neb. 767, in which it was said: "The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed." A remittitur, however, of $10,000 from a verdict of $50,931 was ordered by this court without a finding of passion or prejudice. These cases are not controlling. The general rule, as quoted from *Dailey v. Sovereign Camp, W. O. W., supra,* has been stated in 17 C. J. 1087, sec. 397, but as above noted the cases are in conflict. Whatever the rule may be in other jurisdictions, this court has recognized the power of the district court to require a reduction of the verdict as a condition for overruling a motion for new trial in a number of cases, and in *Chicago, B. & Q. R. Co. v. Krayenbuhl,* 70 Neb. 766, it was expressly held: "In an action for personal injuries,

where substantial damages are proved, but the verdict of the jury appears to be excessive, the error may be corrected by a proper remittitur of the excess directed by the district court, or by this court on a proceeding in error." The power has been exercised by this court in many cases, *e. g., Mullally v. Haslam,* 106 Neb. 860; *Curran v. Union Stock Yards Co.,* 111 Neb. 251; *Morris v. Hines,* 107 Neb. 788; *Swartz v. Drake Realty Construction Co.,* 109 Neb. 746. While this court has approved the rule that, where the verdict is based upon passion and prejudice, a remittitur will not cure it, but a new trial should be granted (*Hoffman v. Chicago & N. W. R. Co.,* 91 Neb. 783; *Phelps v. Bergers,* 92 Neb. 851; *Hutchinson v. Western Bridge & Construction* Co., 97 Neb. 439), the rule seems equally well established that, where the verdict is *merely* excessive, a remittitur is proper. It seems consonant with reason that where there is a clear liability, or where liability is fairly established by the evidence, and passion and prejudice is not shown, but it appears to the court that the verdict is excessive by reason of the jury having taken a mistaken view of the evidence, or proceeded under an erroneous theory, or for any reason other than that denounced by statute, it should have the power to order a reasonable reduction in the interest of ending litigation. *Welsh v. Tri-City R. Co.,* 148 Ia, 200; 17 C. J. 1087, sec. 397.

Plaintiff's counsel claim that the amount allowed by the jury would not more than cover the loss of plaintiff on account only of her inability to carry on her business, without considering pain and suffering, assuming her disability of 75 per cent. in the use of the injured leg. We have not tested the accuracy of plaintiff's figures, but they assume that 75 per cent. disability of the leg creates the same percentage of disability in the business of keeping a boarding house, which seems unwarranted. Also, it appears that the plaintiff is still engaged in that business, but with what financial success is not shown. They further assume that plaintiff, but for the accident, would have been able every year up to the age of 72 to realize the same profit;

also, that plaintiff, though afflicted with an incurable disease, would live out her expectancy. While the reduction of the verdict by one-third seems liberal on the face of the figures, we are unwilling to hold that the trial judge abused his discretion, especially as he was in a better position than a reviewing court to judge the matter. *McCherry v. Snare & Triest Co.*, 130 App. Div. (N. Y.) 241; *McNulta v. Hendele*, 92 Ill. App. 273.

Plaintiff's cross-appeal is dismissed, and the judgment of the district court in all things

AFFIRMED.

MARIE L. BRADLEY, APPELLEE, V. WILLIAM BECKETT ET AL., APPELLANTS.

FILED JANUARY 16, 1929. No. 26265.

1. **Parent and Child: CUSTODY OF CHILD.** In a legal controversy between a mother and strangers over the custody of a child, where the strangers temporarily provided the child a home with the mother's consent, the best interests of the child are material considerations, but the rights of the mother as a natural guardian of her offspring may also be considered.
2. ———: ———. On facts outlined in the opinion, the mother of a child *held* entitled to its custody in preference to strangers who temporarily provided it a home with the mother's consent.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellants.

V. N. Thomas, contra.

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON, EBERLY and HOWELL, JJ., and REDICK, District Judge.

ROSE, J.

This is a controversy over the custody of a child named Anna J. Bradley who was born at Crawford, Dawes county, Nebraska, March 19, 1925. The child was the youngest of three daughters. The mother's name was Marie L. Brad-

ley. Twelve days after its birth Anna Beckett took it to the home of herself and her husband, William Beckett, in Crawford. It has been in their custody and care ever since. They are well along in years, are childless, and are not related to the Bradleys. When the infant was 17 months old its mother asked for it and the Becketts refused to give it up. Upon an application by the mother for its custody, a writ of habeas corpus was issued August 23, 1926. The conflicting claims of the mother and the Becketts were asserted in formal pleadings. After a full hearing in the district court for Dawes county, judgment was rendered in favor of the mother September 7, 1927, and the Becketts appealed.

Should the custody of the child be taken from the Becketts and awarded to its mother? This is the question presented by the appeal. In determining the issue, the best interests of the child are material considerations, but the rights of the mother as a natural guardian of her offspring may also be considered.

Marie L. Bradley urges her motherhood and her love for her child. She also contends that the custody of the Becketts resulted from their generosity and ability to give the child proper care, but that their right to custody was only temporary; that the mother has a suitable home and is able to support and rear her children properly. The Becketts take the position that they accepted the child with the consent of its mother without any obligation to return it; that mutual love and attachment for the child bind it to them and them to it; that they are better able to rear and provide for it; that they are willing to care for it permanently; that, if returned, it will not have a suitable home.

The child was born at the home of Joseph Thompson and wife, parents of Marie L. Bradley. Anna J. Bradley, the infant in controversy, was the third child. Its mother at the time was separated from her husband who was not then supporting his family. In a pending suit she procured a divorce and the custody of her three children. In pre-

paring to support them, while the Becketts were keeping the baby, the mother took a course in a beauty culture school in Chicago. Upon her return to Crawford she joined her sister in conducting a beauty parlor there and promptly made a demand upon the Becketts for her child. She then had her own home on a lot adjoining that of her parents, the beauty parlor being in the house occupied by the latter. She was a high school graduate and had attended the state university. At the time of the trial she was earning approximately $100 a month.

In addition to uncontradicted testimony that the Becketts were able and anxious to provide the child a suitable home and that they were proper persons to have its custody and care, witnesses testified that on different occasions Joseph Thompson, the grandfather, had cruelly punished the older daughters of Marie L. Bradley while they were in the Thompson home, the grandmother having temporary charge of the Bradley children at times when their mother was at work in the beauty parlor. That this punishment was unnecessarily severe was contradicted by other witnesses; but, whatever the fact may be, cruel punishment is not likely to be inflicted in the future, since the police department of Crawford inquired into the matter.

An examination of the entire record leads to the conclusions that the mother, when she demanded her child, and when she applied for the writ of habeas corpus, was a fit person to have its custody; that she is now able to support her children; that she has a suitable home for them.

The testimony of Anna Beckett indicates that she and her husband had a right to temporary custody only. She said on the witness stand that the mother, when demanding her child, asked for a bill of expenses. What then occurred was stated in the language of the witness Anna Beckett as follows:

"'Well,' I said, 'you are not going to take her until I get her weaned and her teeth cut.' 'Yes,' she said, 'I am going to take her.' 'Well,' I said, 'if you are going to take her and going to be mean about it, you give me $2.50 a

day for every day I have had her.' 'Well,' she said, 'you will never get one dollar,' and I said, 'if you will let me keep her until we get her weaned and get her teeth, there would not be any expense, and you can take her.' "

This does not indicate that the mother had abandoned her child, or had forfeited her right to its custody, or that the Becketts had acquired a superior right. The entire burden of support did not fall on the Becketts. To some extent at least the mother or the grandparents furnished clothing and milk and did part of the washing. In the home of the Becketts the child would be deprived of the constant companionship and care of its mother and sisters. Out of compassion for the helpless infant and sympathy for the mother in a time of family trouble and pecuniary distress the Becketts gave the child not only a home but lavished upon it affection and care. The separation will no doubt be a distressing ordeal, but under the circumstances the best interests of the child and the natural rights of the mother seem to demand the sacrifice. This conclusion does not disparage the Becketts. They were prompted by the worthy impulses that keep open in humanity the spiritual fountains of generosity, sympathy and love.

AFFIRMED.

EARL E. BOYD, ADMINISTRATOR, APPELLEE, V. WALTER G. HUMPHREYS ET AL., APPELLANTS: TRENMORE CONE, APPELLEE.

FILED JANUARY 16, 1929. No. 26600.

1. **Master and Servant: INJURY TO EMPLOYEE OF SUBCONTRACTOR: LIABILITY OF CONTRACTOR.** Where an owner enters into a construction contract with another, and the latter sublets a segregated part thereof, and such subcontractor employs another to aid him in his part of the construction (each party having complied with the compensation statutes), and while such employee is engaged in the line of his duties he is injured to his damage, without fault on his part or on the part of his employer, but by and through the actionable negligence of the original

contractor, the latter is a "third" party as defined by such statutes, and is liable to such employee for all damages by him sustained by reason of such negligent act.

2. ———: ———: ———. Under the record, the subcontractor is the only employer of the injured party; further, such employer and his employees engaged in the enterprise are the only ones grouped, all others being "third" parties.

3. Evidence examined and found to support the recovery had.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond, for appellants.

Mullen & Morrissey, Robert R. Mullen, C. J. Endres and *James H. Hanley, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

This is an action wherein the appellee, Earl E. Boyd (hereinafter called plaintiff), as administrator of the estate of Henry Ray Peterson, deceased, seeks recovery of appellants, original contractors, hereinafter called defendants, for negligently causing the death of such Peterson. Trial was had, verdict and judgment rendered in favor of plaintiff for $6,500, to reverse which defendants appeal. Cone, subcontractor of the defendants, and employer of Peterson, is not complaining.

From the record we conclude: That all parties concerned in this case were, at the times involved, operating under our compensation statutes; that the owners of the property were desirous of excavating a certain lake, and, in pursuance of such purpose, let the contract to the defendants herein, who sublet a segregated part thereof to Cone; that Cone employed Peterson, then 19 years old, and under our statutes a minor, which minority, however, in no manner affects the questions here presented, other than as such minority would have bearing on the amount

of plaintiff's recovery on behalf of Peterson's dependents; that, in the course of such excavation by Cone, through the actionable negligence of defendants and without fault on the part of Peterson or Cone, Peterson was killed while at work in the course of his employment, leaving as dependents his father, mother, and minor brothers and sisters; that plaintiff was duly appointed administrator, made application for compensation on behalf of such dependents, and, as Cone the employer refused and neglected to institute this action, it was lodged, as is usual in such cases, by such administrator; that recovery was had as hereinbefore stated, and the same is not reversibly excessive.

While there are several claimed errors urged, each thereof is answered by the foregoing except the following question, to this court novel: Are defendants "third" parties under the provisions of chapter 28, Comp. St. 1922, known as our compensation statutes?

The holdings of the courts of last resort of many different states are cited by the respective parties in their briefs, which show extended research and close analysis on the part of their attorneys. However, the compensation statutes of the respective states which form the basis of the opinions thus cited are so dissimilar, and especially from that of our own, as to render the conclusions reached in no manner controlling. Thus, we are left to glean the intent of our legislative body from the context of the act itself.

Section 3041, Comp. St. 1922 (chapter 28), provides: "Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after de-

ducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future instalments of compensation."

Section 3037 defines "employer" as including, "Every person, firm or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in section 97 of this chapter (3029), and who has any person in service under any contract of hire, express or implied, oral or written, and who prior to the time of the accident to the employee for which compensation under this article may be claimed, shall not, in the manner provided in section 103 of this chapter (3035), have elected not to become subject to the provisions of Part II of this article."

Section 3039 provides, in substance, that one who by scheme or artifice seeks to avoid being held responsible to the workmen for the provisions of this chapter shall be included in the term "employer;" but that this section shall be held to exclude an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance which guarantee payment of compensation according to this chapter to injured workmen.

Section 3040 provides, among other things: "The compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury."

Section 3029 provides, in part: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer."

Section 3033, in part, provides: "When employer and employee shall by agreement, express or implied, or other-

wise as hereinafter provided, accept the provisions of Part II of this article, compensation shall be made for personal injuries or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer."

Section 3038 provides, among other things: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article. The said terms include the plural and all ages and both sexes, and shall be construed to mean: * * * Every person in the service of an employer who is engaged in any trade, occupation, business or profession as described in section 97 (3029) of this chapter, under any contract of hire express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of the state, who for the purpose of making election of remedies under this code shall have the same power of contracting and electing as adult employees."

This chapter deals primarily with the immediate employer and his employee, unless where it was deemed an exception should be made, which exceptions are without force in this consideration and need not be stated. To hold that the statutes warranted the grouping of all those interested in the enterprise within the term "employer," to the extent of excluding them as "third" parties under the statutes, as contended for by defendants, would be to deny to such enactments the plain and every day conception of the language used. The person seeking employment selects the one by whom he desires to be employed, and their minds meet as to the manner of employment. The immediate employer controls, directs, and discharges those by him hired. If any injury coming within the statute occurs, the immediate employer is to receive the notice; he, or the injured party, may lodge the case with the compensation commissioner; if either are aggrieved by the award or refusal thereof, the one thus aggrieved, and he alone, may appeal. If the injury is caused by a third party's negligence, then the immediate employer must refuse or neglect to institute

the common-law action before the employee can thus proceed.

Thus runs the line of demarcation throughout the entire chapter. Hence, we conclude that, under the facts in this case, there is only one employer, and that is Cone, and the only ones grouped are Cone and his employees engaged in the enterprise. The defendants and all others are "third" parties.

The judgment of the trial court is

AFFIRMED.

CHARLES F. PETERSON, APPELLEE, V. WALTER G. HUMPHREYS ET AL., APPELLANTS: TRENMORE CONE, APPELLEE.

FILED FEBRUARY 21, 1929. No. 26673.

Case Followed. Record examined and found to be controlled by the law as announced in *Boyd v. Humphreys, ante*, p. 799; further, the judgment as rendered is sustained by the evidence.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Brogan, Ellick & Raymond, for appellants.

Mullen & Morrissey, Robert R. Mullen, C. J. Endres and *James H. Hanley, contra.*

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

Appellee Peterson recovered judgment against appellants for $2,500, to reverse which the latter appeal and challenge such judgment for the following reasons: That, under our compensation statutes, the appellants are not "third" parties, and, further, that the amount of recovery is excessive.

By agreement this case was consolidated with *Boyd v. Humphreys, ante,* p. 799. The contentions of the respective parties, so far as material, are substantially the same

in the two actions, hence our conclusions in *Boyd v. Humphreys, supra,* are controlling herein as to appellants' first challenge; and as to the second we find the evidence amply sufficient to sustain the recovery had.

It might be well, as further illustrative of the instant case, to state that the appellee Peterson is the father of the injured Peterson boy named in the above reported case, and was employed by the subcontractor Cone, as was the boy, and while so employed and in the course of his business as such employee, while each and all were operating under our compensation statutes, appellee was injured by and through the same actionable negligence of the appellants, the general contractors, as was his son.

Being satisfied with our holding in *Boyd v. Humphreys, supra,* it follows that the judgment of the trial court should be, and is,

AFFIRMED.

RAY MATTHEWS, APPELLANT, V. G. A. CRANCER COMPANY ET AL., APPELLEES.

FILED FEBRUARY 21, 1929. No. 26713.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: "EMPLOYER."** Under section 3039, Comp. St. 1922, the word "employer," as used therein, does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a contractor who sublets and requires his subcontractor to take out such insurance.
2. ———: ———: **"THIRD PERSON."** Such owner, as to the employees of his contractor, is a "third person," as that term is used in section 3041, Comp. St. 1922, and likewise is such contractor as to the employees of his subcontractor.
3. ———: ———: ———: **LIABILITY.** Such "third person" (owner) is liable at common law for any and all damages sustained by his contractor's employees caused by his actionable negligence, and likewise is such "third person" (contractor) liable to the employees of his subcontractor.
4. **Record examined, and found that the trial court erred in sustaining the demurrer and dismissing the action.**

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Reversed.*

Hall, Cline & Williams and *M. L. Poteet*, for appellant.

Dressler & Neely, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

This appeal is prosecuted to reverse a judgment of dismissal of a common-law action for damages on the sustaining of a demurrer to the petition.

For a proper consideration of the demurrer it becomes necessary for us to set out the substance of the material facts pleaded in the petition challenged, all of which facts are admitted by the demurrer, and are as follows: The Crancer Company, appellee, was engaged in buying, selling and delivering pianos and other musical instruments in the city of Lincoln. Payton, appellee, was engaged in the business of moving pianos for hire, as an independent contractor. In the course of such business Payton hired Matthews, appellant, to operate a delivery van for him. In furtherance of its enterprise the Crancer Company contracted with Payton whereby the latter was to deliver pianos for it, and at the same time, as a precautionary measure, requested Payton to procure compensation insurance as by our statutes provided, for the protection of Payton's employees, which was done. Pursuant to the above indicated arrangements, and at the request of the Crancer Company, Payton sent Matthews for a piano, and directed him (as he, Payton, had been informed by the Crancer Company) where and when to go, and how to enter the building where the piano to be delivered was stored. Matthews then proceeded as thus directed, but through the negligence of the Crancer Company, and without fault on his part or on the part of Payton, Matthews was seriously and permanently injured while in the course

of the business for which Payton had employed him, to his great damage. Matthews applied for, and received, compensation from Payton under the above referred to statutes. Payton, after having been by Matthews requested to bring this common-law action, refused and neglected to do so, and Matthews instituted it himself, making Payton a party defendant so that his rights of subrogation and recoupment might be safeguarded.

It is sufficient to say that the allegations of the petition, if proved, would render the Crancer Company liable at common law for the damages which Matthews sustained by reason of the injuries he received, unless such Crancer Company is absolved therefrom by reason of its having required Payton to take out compensation insurance. This conclusion is in harmony with the views expressed in the brief of appellees, as to the demurrer and the questions involved by reason thereof, wherein it is stated: "The Crancer Company demurred to the amended petition filed by the plaintiff for the reason that it had required Payton by express contract to procure a policy of compensation insurance as provided in the compensation act, and was therefore specifically exempted from any common-law liability under section 3039 of the Nebraska workmen's compensation law, and for the further reason that under such section Matthews' rights were to be tested solely by the provisions of the compensation act, and he could not legally bring a common-law suit for damages against the owner of the business in question."

As further stated in appellees' brief, in substance, we have but one question submitted for our consideration: Is the Crancer Company a "third person" within the meaning of section 3041 of such compensation statutes? This question, however, involves the construction of section 3039, as well as section 3041, for, if under section 3039 the Crancer Company is an "employer" of Matthews within the meaning of the act, then certainly it could not be a "third person" as that term is used in section 3041.

We will consider these two sections with others relative

thereto, as was done in the case of *Boyd v. Humphreys, ante,* p. 799.

Section 3039 provides in substance that any owner, or contractor, or subcontractor, who shall, through scheme, artifice or device, seek to execute work without being responsible to the workmen for compensation under the article, shall be included in the term "employer," and with the immediate employer shall be jointly and severally liable to pay compensation, and be subject to all the provisions of the article. And further provides: "This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen."

As we construe this section, the word "employer," as used therein, does not include an owner who requires his contractor to take out compensation insurance, and neither does it include a contractor who sublets and requires his subcontractor to take out such insurance. That is, one who contracts with another to have labor performed, and requires such other to protect the latter's employees by providing compensation insurance, is not an "employer" of such employees, or to them responsible as such; and the same is true as between a contractor and his subcontractor, if the statutory requirements as to compensation insurance are complied with the contractor is not an "employer" of the subcontractor's employees, and neither is he liable to them as such.

Applying this construction to the record before us, the Crancer Company, having required Payton to procure compensation insurance, would have been released from further liability to Payton and his employees so long as it remained

quiescent; but when, as in this case, by and through its wrongful acts of omission and commission, Matthews, Payton's employee, is injured and damaged, it is liable therefor.

Thus, we conclude that the Crancer Company, as to Matthews, was not an "employer," but a "third person" as such term is designated in section 3041, and is answerable to him in damages for the injuries he received. In thus concluding we have but followed our holding in the case hereinbefore cited. Further, under this record and such section 3041, Matthews was clothed with authority to prosecute this action. *O'Donnell v. Baker Ice Machine* Co., 114 Neb. 9.

It follows that the trial court erred in sustaining the demurrer and dismissing the action.

The judgment is reversed and the cause remanded, with leave to defendants to answer.

REVERSED.

JAMES SLOAN, APPELLEE, V. J. S. HARRINGTON, APPELLANT.

FILED FEBRUARY 21, 1929. No. 26719.

1. Master and Servant: WORKMEN'S COMPENSATION ACT: SURRENDER OF RIGHT OF ACTION. Under the record in this case, the surrender, covered by our compensation statutes, of the right to prosecute an action at common law for damages arising from the actionable negligence of another applies solely to the Keystone Company and its injured employee, Sloan.

2. ———: ———: "THIRD PERSON." The term "third person," as used in section 3041, Comp. St. 1922, and applied herein, signifies persons other than such Keystone Company and its injured employee.

3. Trial: WITNESSES: CROSS-EXAMINATION. In a personal injury action, it is permissible, under the rule promulgated in *Jessup v. Davis*, 115 Neb. 1, for the plaintiff to inquire of the defendant on cross-examination as to whether or not he carries liability insurance, and whether he, personally, employed the attorneys for the defense.

4. ———: ———: ———. The purpose of such inquiries is

to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation.

5. ———: ———: ———: INSTRUCTIONS. Further, if requested so to do, the court should, by an appropriate instruction, limit the jury's consideration of such elicited testimony to the purpose permitting its reception in evidence.

6. *Boyd v. Humphreys, ante*, p. 799, *Peterson v. Humphreys, ante*, p. 804, and *Matthews v. Crancer Co., ante*, p. 805, approved and followed.

7. **Quære.** The question of whether or not the term "third person" can be applied to employees of an immediate employer, as between themselves, is left undetermined in this case, as it was in each of the cases noted in the preceding paragraph.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Dressler & Neely and *Amos Henely*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

Heard before GOSS, C. J., DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

THOMPSON, J.

In this action a judgment was recovered by appellee Sloan against appellant Harrington for the sum of $15,000, which on hearing of motion for new trial was, by the court, reduced to $10,000, to reverse which judgment Harrington appeals, and as to the reduction of the amount of recovery from $15,000 to $10,000 Sloan files a cross-appeal.

The city of Omaha was desirous of constructing a storm sewer, and in pursuance thereof let the contract for such construction to the Keystone Pipe & Construction Company, hereinafter called the Keystone Company, and at the same time required it to take out compensation insurance as by the compensation statutes of this state provided. The Keystone Company then sublet a segregated part of the enterprise to Harrington, and as a part of such subletting required him to provide himself with compensation

insurance. In furtherance of that part of the enterprise retained by the original contractor, it employed Sloan, appellee, to lay pipe in trenches excavated and conditioned by Harrington and his employees. As Sloan, in the course of his employment, was so placing a section of pipe, through the negligence of Harrington and his employees, and without fault on the part of the Keystone Company or Sloan, the latter was seriously and permanently injured to his great damage.

It will be seen that all parties involved herein were, so far as their respective contracts are concerned, proceeding under our compensation statutes. The petition is in usual form in actions brought by an employee damaged as charged in this case, by a "third person" as that term is used in section 3041, Comp. St. 1922. Sloan, in his petition, claims in substance that Harrington is, as to him, such a "third person," and thus liable to him at common law for all the damage caused by the negligence of Harrington personally, or by and through his employees. Thus, there is this question, among others, presented: Is Harrington a "third person" within the meaning of section 3041 aforesaid as to Sloan, and indirectly as to the Keystone Company?

It is the contention of Harrington that, as the original contract included the whole project, and the owner required the contractor to provide himself with compensation insurance, and the contractor required the subcontractor to do likewise, the surrender, covered by the statutes involved, of the right to prosecute an action at common law for damages arising from the actionable negligence of another applies to each and all of such parties and their employees; and, further, that the elective compensation provided by our compensatory act is Sloan's sole recovery.

We are convinced that, under the record in this case, such surrender is one that applies solely to the Keystone Company and its injured employee, Sloan; further, that Harrington is a "third person" as to Sloan, and thus liable as by the latter claimed.

To avoid the effect of the foregoing conclusion, however, it is insisted by Harrington that his employees and those of the Keystone Company, in that part of the enterprise out of which the injury to Sloan arose, were, as a matter of fact, jointly acting. This contention is not sustained by the record, and needs no further consideration. Thus, as above determined, Harrington is a "third person." *Boyd v. Humphreys, ante,* p. 799; *Peterson v. Humphreys, ante,* p. 804; *Matthews v. Crancer Co., ante,* p. 805. The question of whether or not the term "third person" can be applied to employees of an immediate employer, as between themselves, is left undetermined in this action, as it was in each of the cases above cited.

Another ground relied on for reversal is that the trial court erred in permitting the attorneys for Sloan to inquire of the defendant on cross-examination as to whether or not he carried liability insurance, and as to whether or not he, personally, employed the attorneys for the defense. The rule permitting of such inquiries was promulgated by this court in *Jessup v. Davis,* 115 Neb. 1, in which case we again construed section 25, art. V of the Constitution of this state as amended in 1920, aided by previous decisions of this court cited in the *Jessup* case. Such rule was in full force at the time of the trial of the instant action, hence, as stated in *Frickel v. Lancaster County,* 115 Neb. 506, 514, this rule "is of course binding on us in review of this case." The purpose of such inquiries, and others of a kindred nature, is to inform the court, jury, attorneys, and litigants as to the true status and actual interest of the parties concerned as well as those participating in the litigation. When this purpose has been met the inquiry should cease. Further, if requested so to do, the court should, by an appropriate instruction, limit the jury's consideration of such elicited testimony to the purpose permitting its reception in evidence. The record before us does not disclose such a request. We do not find the questions propounded to the defendant in the instant case of such a character as to

prejudicially influence the jury, or to deny Harrington due process of law.

We have also given consideration to the challenge of Harrington that the judgment is not supported by the evidence; likewise, the challenge of Sloan, presented by his cross-appeal, that the court erred in reducing the amount of recovery as found by the jury. In doing so, we have carefully examined the entire record, and conclude that the judgment finally rendered is supported thereby.

No reversible error appearing in the record before us, the judgment of the trial court is

AFFIRMED.

JUDITH HALL, APPELLEE, V. LAWRENCE R. RICE ET AL., APPELLANTS.

FILED JANUARY 16, 1929. No. 26161.

1. **False Imprisonment: ELEMENTS: MALICE.** In an action for false imprisonment, malice is not a material element.
2. **———: INSTRUCTIONS: MALICE.** In an action for false imprisonment, an instruction that malice is immaterial, except in so far as, in your opinion, it may affect the extent of her damages, is erroneous, as punitive and exemplary damages are not allowed in this state, unless in cases provided for by express statute, of which false imprisonment is not one. *Johnson v. Bouton*, 35 Neb. 898, syllabus 3, overruled.
3. **Libel and Slander: PRIVILEGED COMMUNICATIONS.** Twenty clerks were employed in a drug store having several departments and a number of cash registers upon which sales were rung up by the clerks indiscriminately. One of the clerks was suspected of taking money from one of the registers, and making false registration of sales, and signed a written confession to that effect. *Held*, in an action for slander by the delinquent against the manager and employer, that a communication by the former to the other clerks of the facts of such confession was qualifiedly privileged.
4. **———: ———: BURDEN OF PROOF.** Where the slanderous words, although libelous *per se*, were uttered under circumstances of qualified privilege, the burden is upon the plaintiff to prove by a preponderance of the evidence that they were uttered with express malice.

5. ———: MALICE: PRESUMPTION: BURDEN OF PROOF. Where the slanderous words are libelous *per se*, malice is presumed, and the presumption furnishes sufficient evidence on that point *prima facie*. It is then incumbent upon defendant to produce evidence sufficient to balance or overcome the presumption; but the burden of proving malice does not shift; it remains with the plaintiff. So much of the fourth syllabus and opinion in *Estelle v. Daily News Publishing Co.*, 99 Neb. 397, as apparently conflicts with the rule as above stated, is overruled.

6. ———: PRIVILEGED COMMUNICATIONS: INSTRUCTIONS. In an action for slander presenting a question of qualified privilege, an instruction that, if the jury found that plaintiff did not take any money belonging to defendant company, defendant's manager would not be justified in stating to the other employees that plaintiff had taken the money and had confessed, is prejudicially erroneous, as it ignores the defense of privilege pleaded in the answer.

7. Trial: INSTRUCTIONS. It is the duty of the trial judge to instruct the jury correctly upon the law as applied to the issues presented by the pleadings, if supported by the evidence, whether requested or not.

8. Appeal: OBJECTIONS. Where objection is made to improper argument of counsel in opening and a ruling had thereon, it is not necessary to make repeated objections on the same point to arguments of other counsel in the closing, in order to review such conduct.

9. ———: MISCONDUCT OF COUNSEL. Conduct of counsel in argument, set forth in opinion, *held* ground for reversal.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

Montgomery, Hall, Young & Johnsen, for appellants.

George Evens and *Thomsen, Mossman & Standeven, contra.*

Heard before GOSS, C. J., ROSE, THOMPSON and EBERLY, JJ., and REDICK and STALMASTER, District Judges.

REDICK, District Judge.

The plaintiff brings this action against the defendants, Lawrence R. Rice and Louis K. Liggett Company, a cor-

poration, and sets forth in her petition two causes of action, one for false imprisonment and one for slander. Plaintiff was in the employment of the defendant company as manager of the candy department, and defendant Rice was general manager of the drug store.

For her first cause of action, plaintiff alleges that she entered the employ of the defendant company about June 15, 1926, and continued such employment until November 12 following, when she was discharged; that on November 12 she was called from the store to the office and accused of stealing money, that she was forcibly detained in the office, and by threats and intimidation compelled to sign a confession to the effect that she had made a sale in the amount of $2.51 and rung up on the register only 51 cents, had taken $1 from the register for her own purposes, and had, during her employment, taken money of the company in different amounts averaging about $3 a day, a total of $350; that defendants had reported such defalcation to the insurance company who had plaintiff's fidelity bond, in consequence of which she had been blacklisted and unable to obtain work, and alleged damages of $10,000.

For her second cause of action, she alleged that the defendants, wrongfully and wilfully and with the purpose of injuring plaintiff in her character and standing in the community, stated to the other clerks in the store that plaintiff had embezzled money belonging to defendant company and had signed a written confession to that effect; that defendant Rice uttered said slander with full knowledge that the same was untrue and that the confession had been secured by threats and coercion, and asks damages of $15,000.

In separate answers, the defendants answered the first cause of action and denied each allegation thereof except the employment of plaintiff and the forwarding of notice of the defalcation to the bonding company. Defendants further allege that on November 12, 1926, plaintiff was observed to make a cash registration of only 51 cents on a $2.51 sale in her department, and upon being asked for

an explanation admitted the facts set forth in the confession, and made the same voluntarily without any coercion on the part of any one; that plaintiff actually made misappropriations of money, as admitted by her, and that notice to the bonding company was an act which defendant had a legal right to do.

In answer to the second cause of action, defendants denied each and every allegation not specifically admitted, alleged the facts with reference to the register, misappropriation and confession as stated in the answer to the first cause of action, and after the signing of the confession, defendant informed plaintiff's coworkers and fellow employees thereof, and that such communication was made in good faith, in the interest of the integrity of the business and of plaintiff's fellow employees, without malice, for justifiable purposes and with an actual belief in its truth; and that the making of such communication was privileged under all the circumstances.

In reply plaintiff filed a general denial.

The cause was tried and submitted to a jury, which returned a verdict for the plaintiff in the sum of $5,000. Motions for new trial were overruled, judgment rendered on the verdict, and defendants appeal.

Defendants file eight assignments of error as ground for reversal, three of which we will consider.

1. Exception is taken to that portion of instruction No. 12 on the measure of damages upon the cause of action for false imprisonment, to the effect that the jury should take into consideration "whether or not the defendants acted maliciously in the premises. Whether defendants acted maliciously, however, is immaterial to her cause of action for any false imprisonment, except in so far as, in your opinion, it may affect the extent of her damages." The point made is that by this instruction the jury were permitted to assess punitive damages against the defendants if they found that they acted maliciously. The instruction is erroneous. Malice, as stated, was no part of the cause

of action for false imprisonment, and to authorize that element to enter into the assessment of the damages had a tendency to permit the jury to assess the same at a sum in excess of just compensation. It is true that in closing the instruction the court told the jury that they could not allow exemplary or punitive damages, but this was inconsistent with the previous statement, and we are not able to say which statement was adopted by the jury. In 25 C. J. 545, it is said: "Evidence as to malice is ordinarily inadmissible (in a false imprisonment action), malice not being an element of the cause of action. But evidence of good faith importing a lack of malice is admissible for the purpose of obviating or mitigating exemplary damages." The latter part of the text quoted has no application in this state because punitive or exemplary damages are not allowed, unless by express statute in certain cases, in which false imprisonment is not included.

The plaintiff cites on this point *Johnson v. Bouton*, 35 Neb. 898, in which syllabus 3 is as follows: "The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damages." The case in question is not controlling for two reasons: (1) The question arose from the refusal of the trial court to instruct the jury that the plaintiff must prove that the original prosecution was without probable cause and was malicious, and the court approved the refusal, stating: "False imprisonment is the unlawful detention of the injured party"—and then added the matter quoted in the syllabus above, citing *Comer v. Knowles*, 17 Kan. 436. This last expression was not necessary to the determination of the question presented to the court. (2) Under the laws of Kansas at the time of the decision cited, punitive and exemplary damages were allowed.

2. Exception is taken to instructions Nos. 13 and 15, given by the court on its own motion, as follows:

"13. With regard to the plaintiff's second cause of action, *i. e.* her claim for damages on account of slanderous statements claimed to have been made by the defendants,

the defendants in this action allege substantially as a defense that the plaintiff on November 12, 1926, misappropriated money from the cash register and that she had previously during the time of her employment misappropriated other moneys of the defendants. The burden of proof rests upon the defendants to prove these allegations by a preponderance of the evidence. * * * If they have failed to prove either of these allegations by a preponderance of the evidence, then it will be your duty to return a verdict for the plaintiff for the amount in which you find she has been damaged because of these statements made by the defendants."

"15. If you find the plaintiff did not at any time take or misappropriate any money belonging to the defendant company, then the defendant Rice would not be justified in stating to the employees of the store that the plaintiff had taken money of the company or that she had confessed to having taken money of the company."

The objection to these instructions is that they omit all reference to the question of the privileged character of the communication, predicating liability of defendants solely upon the determination of the question whether or not plaintiff had in fact embezzled money of defendant company. Defendants contend that, where the communication complained of is one of qualified privilege, defendants cannot be made liable therefor, unless the plaintiff proves by a preponderance of the evidence that the slanderous communication was made with express malice; that if defendants had an honest belief in the truth of the statements made by them, and such belief was founded upon facts reasonably inducing it, the defendants are not liable, even though the statements were false in fact. We think the point is well taken. That the communication was one of qualified privilege is beyond dispute. It dealt with a matter in which defendant and its employees had a mutual interest. The cash registers in the store were used by all of the employees, at one time or another, and each employee had a personal interest in the honesty of every other, for if

one is dishonest suspicion may be cast upon all. The defendants were interested in the integrity of the business and in protecting their employees from unwarranted criticism in the performance of their duties. The rule is succinctly stated in *Wise v. Brotherhood of Firemen and Enginemen*, 252 Fed. 961: "A communication is privileged if made *bona fide* by one who has an interest in the subject-matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information." This statement of the rule was approved in *Peterson v. Cleaver*, 105 Neb. 438, in which it was also held that a communication which is qualifiedly privileged, though it contain words which are libelous *per se*, is a complete defense to an action for libel, "unless it is shown by plaintiff by a preponderance of the evidence that the publication was made with express malice." See *Nichols v. Eaton*, 110 Ia. 509; *Harrison v. Garrett*, 132 N. Car. 172; also *Livingston v. Bradford*, 115 Mich. 140, which quotes with approval the remark of Baron Parke: "If such communications are fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected by the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."

In *Estelle v. Daily News Publishing Co.*, 99 Neb. 397, the fourth syllabus is as follows: "A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements published are false, and libelous *per se*, malice is presumed, and the burden is upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true." And in the opinion, page 400, it is said:

"One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement was true

and was made with good motives and for justifiable ends, although such statement is libelous *per se*. If the statement is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth."

There is an apparent conflict between this statement of the rule and that in *Peterson v. Cleaver, supra*, but we think it is only apparent. The latter case merely states the rule, while the former states the legal presumption as a sufficient compliance therewith, unless it is met by evidence of the defendant that he in good faith believed the truth of the statement and that he had evidence sufficient to justify a reasonable man in belief of its truth. In this state it is too well established for discussion that the burden of proof never shifts, that where it is rightly placed upon one party it continues there until the end of the trial. It not infrequently happens that the words "burden of proof" are used to express the idea that, after a *prima facie* case is made by the party having the burden, it is then incumbent upon the other party to produce proof to meet the case so made; but such employment of those words is inaccurate. The word "burden" when used with reference to proof has attained a special significance in law, indicative of a requirement that the party upon whom it is cast must prove the fact in question by a preponderance of the evidence; its use, therefore, to express the idea merely that evidence must be produced to meet a *prima facie* case made is inaccurate. The use of the word "burden" as applied to the defendant in syllabus 4 in the *Estelle* case was unhappy, and is inconsistent with the first paragraph thereof, which implies that the burden of proving malice is upon the plaintiff, as positively held in *Peterson v. Cleaver, supra*. Having thus stated the rule, it is confusing to place the burden of proving the nonexistence of malice upon the defendant. A more accurate statement would be: "If, however, the statements published are false, and libelous *per se*, malice is presumed, and the defendant is then re-

quired to produce evidence sufficient to meet or overcome the presumption, to the effect that evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true." We think, moreover, that the word "burden" as used in the syllabus and opinion should be understood as meaning "incumbent upon" or "duty." The presumption merely furnishes a rule of evidence which is sufficient until balanced or overcome by evidence upon the part of the defendant. Whether or not the evidence was sufficient in the present case to defeat the action was a question for the jury and should have been submitted to them by a proper instruction.

Plaintiff, however, invokes the well-established rule that, in order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topic, citing a number of cases from this state. We have examined those cases and all present a failure to instruct on some particular feature of the case. In one of them it is said: "It is not contended that any of the instructions misstated the law, but the complaint is they omitted certain features of the case upon which the jury should have been instructed, both in stating the issues and the law applicable thereto." *Carter White Lead Co. v. Kinlin*, 47 Neb. 409. The case here presents a different situation. It is not merely a case of omission, but one of commission. The complaint is that the instructions above quoted misstated the law as applied to the case on trial, that it is not a correct statement in a slander case involving the question of privilege, that liability may be predicated by the jury solely upon the falsity of the statement complained of without reference to the question of privilege. That question was properly included in the statement of the pleadings, but was ignored by the instructions which purported to cover all matters necessary for plaintiff to prove. We think the rule contended for is not applicable.

3. The last assignment of error to which we will refer has to do with misconduct of counsel, which defendants claim resulted in an excessive verdict. Upon the opening argument of Mr. Evens, the following colloquy occurred:

"Mr. Johnsen: The defendants except to the argument of Mr. Evens with reference to the giganticness of this corporation, as being prejudicial, and having no bearing on the issues in this case, and having no bearing on the evidence. The exception is predicated upon the remarks made by Mr. Evens to the jury, that the defendant is one of the most gigantic corporations in the country. The Court: I think the exception should be sustained. It is really immaterial whether it is a large corporation or a small one, and I think you had better not comment upon it. Mr. Evens: I will eliminate the word 'gigantic' but I can state that there are some four hundred stores. Mr. Mossman: Call it small, George, call it small. Mr. Johnsen: I except to the remark of Mr. Mossman, as prejudicial. The Court: Yes; leave those remarks out."

Upon the closing argument by Mr. Mossman, a copy of which was presented upon a motion for a new trial before the district court and preserved in the bill of exceptions, the rule and admonition of the court above set forth was entirely ignored by the speaker. Glancing through the report of his argument we note that he referred to defendant company as a corporation without any feeling or soul three times, as a big corporation twice, as consisting of 440 stores once, as rich clients once, and to the witnesses for defendants as these New Yorkers ten times. We need hardly remark that these matters were immaterial and furnished no proper basis for argument. This is particularly true as to such of them as had been ordered left out by the court. Such tactics have been frequently condemned by the courts. Plaintiff calls attention to the rule that, before improper conduct of counsel may be urged as error upon appeal, the objection to it must have been made at the time, a ruling of the court had thereon and exception taken, which is undoubtedly the general rule, but not applicable to the pres-

ent situation. Objection was made and ruling had upon the subject-matter during the opening argument. We think it was unnecessary for defendants' counsel thereafter to make repeated objections to each disregard of the ruling of the court. To require this might result in placing the defendants in a less favorable position before the jury, and thus inflict upon them a penalty for the wrongful conduct of plaintiff's counsel. The remarks of Sullivan, J., in *Ashland Land & Live Stock Co. v May*, 59 Neb. 735, are pertinent:

"We have little patience with counsel who deliberately seek to achieve success by lawless methods; and we do not hesitate, in any case, to deprive them of advantages thus obtained. In the performance of professional duties, counsel should endeavor always to conform their own conduct to the law which they have been commissioned to assist in administering."

In the trial of every contested lawsuit, there is abundance of opportunity, growing out of the material facts and circumstances of the case, for the display of extraordinary talent and the exercise of adroitness and finesse without resort to illegitimate methods tending only to arouse the passion and prejudice of the jury. It is of greater importance that the administration of justice be regular and orderly, than that counsel be afforded an opportunity to exhibit their peculiar prowess in the use of questionable methods.

We are not able to determine what influence, if any, the improper argument of counsel had upon the jury, but it was well calculated to distract their attention from the real issues, and the refusal to grant a new trial on this ground was prejudicial error.

Other errors assigned need not be discussed, as they will probably not occur on another trial.

For errors above noted, the judgment of the district court is

REVERSED.

CECIL F. GALLOWAY, APPELLEE, V. EMIL E. WOLFE ET AL., APPELLANTS.

FILED JANUARY 19, 1929. No. 26393.

Statutes: ACT RELATING TO PUBLIC DANCES: CONSTITUTIONALITY. That portion of section 9795, Comp. St. 1922, providing that any person of the age of fourteen years or upwards found engaged in public dancing on Sunday shall be fined or imprisoned, or both, but excepting from its provisions "cities of metropolitan class having a public welfare board with authority to regulate public dancing," is invalid, as class legislation, under section 18, art. III of the Constitution of Nebraska, prohibiting the passage of any local or special law "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever:"

(a) Because it discriminates between persons of the same class doing the same act, and,

(b) Because it discriminates between metropolitan cities, and between them and other cities, by a classification having no reasonable basis.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed and dismissed.*

Slama & Donato, J. H. Barry and *Burkett, Wilson, Brown & Wilson,* for appellants.

O. S. Spillman, Attorney General, Richard F. Stout, E. S. Schiefelbein and *Cecil F. Galloway, contra.*

Heard before GOSS, C. J., ROSE, DEAN, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

This is an action brought by Cecil F. Galloway, county attorney of Saunders county, to enjoin the defendants from promoting public dancing on Sunday at a park located on Scott's lake, about a mile and three-quarters from the village of Morse Bluff, in that county. The defendants are respectively the owner of the land, the Scott's Lake Outing Club, a corporation, and its officers. The petition alleges that the defendants are permitting and promoting public

dancing on the premises of the club, on Sundays, contrary to the statute in that behalf. The defendants by their answers admit that one of the purposes of the club is to hold dances on Sunday in connection with other amusements usually indulged in at amusement parks, but contend (1) that the statute upon which plaintiff bases his action for an injunction is unconstitutional, being class legislation, and (2) that a court of equity has no jurisdiction to grant the relief prayed. An injunction was allowed by the district court, and defendants appeal.

Section 18, art. III of the Constitution, provides: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

Section 9795, Comp. St. 1922, is the statute under attack, and, in so far as it applies to the question for decision, is as follows:

"If any person of the age of fourteen years or upward shall be found on the first day of the week commonly called Sunday, * * * engaged in public dancing, * * * he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. * * * Provided, the provision of this act relating to public dancing shall not apply in cities of metropolitan class having a public welfare board with authority to regulate public dancing."

The first question for determination is whether or not the statute above quoted is class legislation within the prohibition of the Constitution above set forth. The principles which must govern us in determining this question are well established and understood. In *Allan v. Kennard,* 81 Neb. 289, it was held: "The power of classification rests with the legislature, and this power cannot be interfered with by the courts, unless it is clearly apparent that the legislature has by artificial and baseless classification at-

tempted to avoid and violate the provisions of the Constitution prohibiting local and special legislation." And it was said in the opinion, page 293: "It is also true that the legislature may classify the subjects, persons or objects as to which it legislates. But such classification should rest upon some difference in situation or circumstances between the thing or person placed in one class and that placed in another." In *State v. Murray*, 104 Neb. 51, 55, the following statement was approved: "By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case of offending."

In *Low v. Rees Printing Co.*, 41 Neb. 127, an act excepting those engaged in farm or domestic labor from the operation of the eight hour law was held invalid as class legislation, citing with approval the language of the court in *State v. Sheriff of Ramsey County*, 48 Minn. 236: "In *Nichols v. Walter*, 37 Minn. 264, it was held that a law was general and uniform in its operation which operates equally upon all the subjects within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class; and the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them."

"A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations or circumstances provided for, is not objectionable as wanting uniformity of operation." *State v. Berka*, 20 Neb. 375.

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560, it was said by Justice Harlan: "The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve

public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification.' * * * *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150."

With these principles in mind, let us consider their application to the present problem, and first we should inquire what is the classification attempted to be made by the legislature. The act does not relate to the government of municipalities, and makes no attempt to classify them as such. It has to do only with the conduct of individuals, and divides them into two classes: First, those who live in metropolitan cities, and, second, those who live outside such cities. The first part of the act is general in its terms and includes all persons "of the age of fourteen years or upward" found engaged in public dancing on Sunday. This, therefore, is the class to which the legislation is to be applied. But the act by the proviso seeks to withdraw from its operation persons engaged in public dancing on Sunday in metropolitan cities having a public welfare board with authority to regulate such dances. The effect of this legislation is to make it a misdemeanor punishable by fine and imprisonment for those members of the class engaging in public dancing on Sunday outside of metropolitan cities, but permits other members of the same class to so engage without penalty in the metropolitan cities specified. What reason can be found for this discrimination? Clearly, the mere fact of the location of the individual in one city or another, or in the country, forms no basis for classification. If public dancing on Sunday is a scandal or injurious to health or morals in a village or country park, it is at least equally so in metropolitan cities, if not, indeed, more so, because of the greater number of persons liable to observe it. The only reason suggested is that public dancing may be supervised, regulated and controlled in metropolitan

cities having a welfare board, while they are not subject to such regulation in the country. We will discuss this proposition later on.

It seems to be contended by plaintiff that the classification attempted by the legislation is between counties or surburban communities and metropolitan cities; but, as just above suggested, the act condemned, if vicious, is equally so, considering the general purpose of the legislation, whether committed in a city or less populous community. There is, therefore, no reasonable relation between the act and the classification contended for. Indeed, the legislature seems to have recognized this fact by placing in its proviso the condition that the act should be inapplicable only to metropolitan cities *having a welfare board with authority to regulate public dancing.* We are clearly of the opinion that the classification attempted is of persons or individuals as above indicated, and confers upon members of the class operating in metropolitan cities a special privilege which is withheld from other members of the same class operating in other parts of the state, and is therefore within the prohibition of the Constitution. *Bessette v. People,* 193 Ill. 334; *Badenoch v. City of Chicago,* 222 Ill. 71.

In *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, it was held that an Illinois trust statute, providing that all persons who combine their capital, skill or acts for any of the purposes named in the act may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, was invalid under the provisions of the federal Constitution that no state shall deny to any person within its jurisdiction the equal protection of the laws, and approved the interpretation of that section as stated in *Missouri v. Lewis,* 101 U. S. 22, 31: "That no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circum-

stances." So far as the phrase "same place and under like circumstances" is concerned, it has no reasonable application to the present case for reasons above stated. It would seem, however, that public dancing is substantially the same wherever carried on, whether out of doors in a park, as here, or in a public hall in a city, and under the circumstances of a dance floor and music.

The plaintiff cites *Allan v. Kennard,* 81 Neb. 289, sustaining a legislative classification discriminating between counties and metropolitan cities with reference to the duties of the county comptroller; there was no attempt to classify persons or individuals; *In re Caldwell,* 82 Neb. 544, classifying barbers as common laborers; and *State v. Murray,* 104 Neb. 51, sustaining the act in question providing a greater penalty for barbers conducting their business on Sunday than that imposed upon common laborers, on the ground that there was a reasonable distinction between barbers and other common laborers, and that the act applied to all barbers in the state. These cases are not in point here. In the instant case the act is not applicable to all members of the same class but discriminates between them without apparent reason.

We next consider the point that metropolitan cities having a welfare board furnish a sufficient difference in circumstances upon which to base the attempted classification. There would be more force in this suggestion if all cities and communities having a welfare board, or power to regulate public dancing, were excepted from the provisions of the act. The reason for the classification would be much more apparent as the regulation of public dances, which require no invitation but are open to all those who are willing to pay a small fee for the privilege, is most desirable on grounds of morality and decency. But to single out metropolitan cities having a welfare board, as a class, has no foundation in reason or experience. The same vices and immoralities may be present at a barn dance in the country as in a gilded palace in a metropolitan city. What reason can be suggested for discrimination, for the pur-

poses of the act, between the city of Omaha and the city of Lincoln? First class cities in Nebraska of over 40,000 and under 100,000 inhabitants, and of 5,000 to 25,000 inhabitants, and second class cities, all have power to regulate public amusements and enforce Sunday laws, but they have no welfare board, and therefore public dancing is a misdemeanor therein. It therefore appears that the only reason for the classification is as applicable to other cities as to those classified, and yet the former are excluded from the privileges and immunities of the latter. Further, the act does not require that public dances be in fact regulated in metropolitan cities, but merely that they have a welfare board with *power* to regulate. If the classification of the proviso had been *all cities and villages* having a welfare board having authority to regulate, or, better still, in which public dancing is supervised and regulated by the municipal authorities, the objection of discrimination between different localities would be met. But suppose these other cities provide a welfare board, still public dancing on Sunday cannot be permitted because they do not measure up to the metropolitan class in population. Before any city outside the metropolitan class can enter the class erected by this statute it must have a population of 100,000 or more, and have a welfare board with authority to regulate public dancing. As a practical proposition they are prevented from ever entering that class, and so within the rule laid down in *State v. Kelso,* 92 Neb. 628, that a classification which limits its provisos to a certain class then in existence, excluding all others from ever entering such class by growth, development, or other cause, is invalid. True, it may be that in 50 or 100 years one or more cities may have a population sufficient to qualify them as metropolitan, but the possibility, except perhaps the city of Lincoln, is so remote as to exclude it from consideration.

In *Bessette v. People,* 193 Ill. 334, it was held that a statute regulating horse-shoeing in cities of over 50,000 and permitting cities of over 10,000 to adopt the provisions of the act, thus excluding towns under 10,000, is void as

discriminatory and unreasonable between persons engaged in the same occupation; and also void if construed as a classification of towns and cities. In *Badenoch v. City of Chicago*, 222 Ill. 71, an act making salaries and wages of officers of certain municipalities subject to garnishment, and exempting others, was declared void and as discriminatory as between persons of the same class. Upon the general question of classification, see, *State v. Mayo*, 15 N. Dak. 327; *Cleland v. Anderson*, 66 Neb. 252; *State v. Robinson*, 35 Neb. 401; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 200; *State v. City Council of City of Lincoln*, 98 Neb. 634.

In *Rushart v. Crippen*, 99 Neb. 682, we held: "In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court will take judicial notice." Giving full force to the presumption above noted, we are constrained to hold invalid that portion of the act in question relating to public dancing on Sunday as being discriminatory between different individuals of the same class, between metropolitan cities, and between them and other cities and communities, by reason of a classification having no logical basis for its support.

We must not be understood as questioning the power of the legislature to prohibit public dancing on Sunday by an act which operates alike upon all persons within the state, or upon all persons alike within the classes to which the law is made applicable, provided the classification declared is based upon such differences of place and circumstance, having a logical relation to the general purpose of the act, as to afford a reasonable basis for differentiation between the classes named. Nor is the remainder of the act affected hereby, it not appearing that the invalid provisions constituted the inducement for its enactment.

In view of our holding, it will not be necessary to discuss the other defense. It follows that the judgment of the district court must be reversed and the action dismissed.

REVERSED AND DISMISSED.

STATE, EX REL. J. I. CASE THRESHING MACHINE COMPANY, APPELLEE, V. FRANK MARSH, SECRETARY OF STATE, APPELLANT.

FILED JANUARY 24, 1929. No. 26821.

Licenses: CORPORATIONS: OCCUPATION TAX. Sections 679-684, and 697, Comp. St. 1922, requiring the payment of an occupation tax by corporations, construed, and *held:*

(1) That it was the intention of the legislature to place domestic and foreign corporations upon an equality with reference to such tax.

(2) That the term "paid-up capital" as applied to Nebraska corporations means the amount of authorized capital stock employed in the business.

(3) A foreign corporation being required to pay the "same amount" as a domestic corporation, the term "paid-up capital" should be understood in the same sense in which it is applied to the latter.

(4) That the occupation tax of a foreign corporation should be computed upon the basis of the amount of its paid-up capital stock employed in this state.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

O. S. Spillman, Attorney General, and *Lloyd Dort,* for appellant.

John J. Ledwith, H. N. Mattley and *Upham, Black, Russell & Richardson, contra.*

Kennedy, Holland, De Lacy & McLaughlin, Montgomery, Hall, Young & Johnsen, Ziegler & Dunn, Edgar M. Morsman, Jr., and *Brogan, Ellick & Raymond, amici curiæ.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

REDICK, District Judge.

Application by the plaintiff for a writ of mandamus directed to the defendant, Frank Marsh, secretary of state, requiring him to accept from the plaintiff the sum of $130 as plaintiff's occupation tax for the year 1928, and to execute a certificate as provided by law. The petition alleges that plaintiff first tendered the sum of $60 together with the annual statement required by law of foreign corporations, and that defendant refused the same upon the ground that the tangible property in the state of Nebraska belonging to plaintiff should be included in arriving at the total amount of its paid-up capital stock employed in Nebraska, and demanded the sum of $130; that thereupon plaintiff tendered $130 but the same was refused, defendant claiming that plaintiff should pay the sum of $2,000. Thereupon this action was brought. Defendant filed a general demurrer to the petition, which was overruled, and, defendant electing to stand upon his demurrer, judgment was entered awarding the writ, and defendant appeals.

The question for determination involves the proper construction of the following sections of the Compiled Statutes of this state for 1922 requiring the payment by domestic and foreign corporations of an annual occupation tax. They will be stated in substance or quoted as seems requisite for a proper understanding of the question.

Section 679 provides for the annual filing on July 1 of reports by corporations organized under the laws of this state.

Section 680 prescribes what shall be set forth in such report: Name of the corporation, location of its principal office, names and addresses of its officers and directors, date of annual election, amount of authorized capital stock and par value of each share, amount of capital stock subscribed, issued, outstanding and paid up, the nature and places of business, and any changes in the above particulars made since the last report.

Section 681: "At the time of filing such annual report it shall be the duty of every corporation, for profit incorporated under the laws of this state, to pay to the secretary of state an annual fee as follows: When the paid-up capital stock of the corporation exceeds one thousand dollars, but does not exceed ten thousand dollars, such annual fee shall be five dollars." Then follow provisions for payment of fees, in an ascending scale up to twenty-five million dollars paid-up capital, upon which the annual fee is fixed at two thousand dollars, and upon all paid up capital in excess thereof twenty-five hundred dollars.

Section 682: "Each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing, to the secretary of state, annually, during the month of July, in such form as the secretary of state may prescribe. The report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, superintendent or managing agent in this state, and forwarded to the secretary of state."

Section 683 provides for reports by foreign corporations, including all the particulars mentioned in section 680, and in addition the following: "7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state. 8. The name and location of its office or offices in Nebraska, and the name and address of the officers or agents of the corporation in charge of its business in Nebraska. 9. The value of the property owned and used by the company in Nebraska, where situated, and the value of the property owned and used outside of Nebraska and where situated."

Section 684: "Upon the filing of such report with the secretary of state, it shall be the duty of every foreign corporation, for profit now or hereafter doing business in this state, to pay to the secretary of state as an annual fee the

same amount as the annual fee prescribed in the third next preceding section (681) for corporations incorporated under the laws of this state."

Section 688 requires the secretary of state to deliver to the corporation a certificate of compliance with the above sections.

Section 697: "Any county clerk shall, upon request of the secretary of state, furnish him with such information as is shown by the records of his office concerning corporations located within his county, and subject to the provisions of this article. The secretary of state, or any person deputed by him for the purpose of determining the amount of fees due from such corporation, shall have authority to investigate and determine the facts showing the proportion of the paid-up capital stock of the company represented by its property and business in Nebraska."

The contention of the plaintiff is that under these sections the occupation tax of foreign corporations should be calculated upon the proportion of its paid-up capital used to transact its business in the state of Nebraska; while defendant contends that it should be calculated upon the total amount of the paid-up capital of the corporation. In reply, plaintiff insists that, if the construction contended for by defendant is the true one, the statute is in conflict with the Constitution of the United States, as an unlawful burden upon interstate commerce, as a tax upon property outside of the state of Nebraska, as denying the plaintiff the equal protection of the laws, and as taking property from plaintiff without due process of law. If plaintiff's construction is the true one, he is entitled to the relief prayed. If defendant's construction is adopted, it will be necessary to consider the constitutional objections above noted.

We will, therefore, first examine the question of construction; but we must first determine whether or not the statutes are a proper subject for construction, and this depends upon whether or not they are clear and unambiguous or whether the language employed by the legislature is

susceptible of more than one meaning. Perhaps we might rest this determination upon the fact that a distinguished attorney general of this state and several secretaries of state have adopted plaintiff's construction, while the present secretary takes the opposite view, but we have considered the question independently, and have no hesitancy in pronouncing the sections of the law ambiguous and requiring construction. The uncertainty arises out of the use of the words "same amount" when considered with the other provisions of the act. Do they mean an equal amount in dollars and cents determined by the total paid-up capital, or such portion as is owned or used in this state?

The question is not free from difficulty. Our purpose, of course, must be to discover and declare the intention of the legislature, and it seems proper to recall briefly the rules of law by which such intention is to be found. Any supposed intention must be consistent with the words of the enactment taken in their ordinary and accepted meaning, unless it clearly appears that they were used in a different sense. The reason and intention of the lawgiver, however, will control the strict letter of the law *(State v. Drexel,* 75 Neb. 614) when the latter would lead to a palpable injustice or absurdity. *Kelley v. Gage County,* 67 Neb. 6. Each and every part of the statute must be given effect. The history of the legislation and the old law upon the same subject, as well as the general object, spirit and purpose of the law may be considered.

We will be aided by a consideration of the history of the legislation as affecting some of the above questions. It began with chapter 25, Laws 1909, whereby a nominal fee was fixed in an ascending scale applicable to all corporations, domestic and foreign, based upon the capital stock of each corporation. By chapter 29, Laws 1911, the above act was amended by providing that the basis of the tax should be the *paid-up* capital stock of the corporation. This change, apparently, was made because it seemed unfair to require payment upon the total capital stock in

cases where only a portion of it was paid in and actually used in the business.

It seems probable, though we do not decide the point, that both of the above acts, as applied to foreign corporations, were obnoxious to the Constitution of the United States under the decisions of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, *Pullman Company v. Kansas*, 216 U. S. 56, and *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146.

However, chapter 240, Laws 1913, the present law, was enacted amending that of 1911.

Whether or not the legislature may discriminate between foreign and domestic corporations in the assessment of occupation taxes, it is perfectly clear from a consideration of these three acts that it was the intention of the legislature to put domestic and foreign corporations upon an equality in this regard, no distinct or separate treatment being had in the first two acts, and it being provided by section 684 of present act that a foreign corporation pay the "same amount" as that prescribed for corporations incorporated under the laws of this state By section 681 domestic corporations are required to pay an occupation tax based upon the amount of their paid-up capital, and it seems to be the contention of the defendant that, therefore, if foreign corporations are to pay the same amount, the tax must be computed upon *their* paid-up capital; but this leaves out of view the underlying thought involved in the expression "paid-up capital" as applied to domestic corporations; that is, the amount employed in its business, which is under the protection of the laws of the state and properly subject to taxation. This was apparently the determining factor in the amendment of 1911 changing the law by substituting the words "paid up" for "authorized" capital. Paid-up capital of a domestic corporation, in view of these circumstances, is quite different from paid-up capital of a foreign corporation, which, as such, is not subject to local taxation, or no portion of which is employed in the state. It would seem, therefore, that, if the foreign cor-

poration is to pay the *"same amount"* required of a domestic corporation, the words "paid-up capital" must be understood in *that sense in which they are applied to the latter.* In other words, if all corporations are to be treated alike, and the basis of the tax as to domestic corporations is the amount of capital actually engaged in the prosecution of its business, the same basis should apply to foreign corporations. If the foreign corporation is to pay the same amount as the domestic corporation, the conclusion is irresistible that the intention was to place them upon an equality. Equality is not secured unless the computation in both cases is made upon the same basis. The law does not say that the amount shall be computed on the paid-up capital of the foreign corporation, but that the latter shall pay the same amount as a domestic corporation, and, as appears later on, provides how that amount shall be determined.

Again, section 682 requires a report from each foreign corporation "owning or using a part or all of its capital or plant in this state;" and section 683 requires a statement of how much capital is employed within and how much without the state. The evident intention was (1) to tax only such foreign corporations as used part or all of their capital in the state, and (2) to base the tax exaction upon the amount so used. Now, the business of the foreign corporation subject to an occupation tax in this state is only such portion thereof as is transacted in this state. This state has no power to project even its taxing arm beyond the territorial borders and levy upon property there located. There is a presumption that the legislature intended to tax only that which it had the constitutional power to tax *(Singer Sewing Machine Co. v. Brickell,* 233 U. S. 304), and this is a proper consideration in construing the law. Defendant contends that this is not a tax but a condition imposed for doing business in the state; but these questions are unimportant, in view of the construction we have adopted, the result being the same whether it is a tax or an occupation fee.

But when the provisions of the act specially applicable to foreign corporations are considered, the intention of the legislature to assess the occupation tax upon the basis of the amount of capital employed in the prosecution of its business in the state of Nebraska, and not upon the entire paid-up capital of such corporation, seems more clearly manifest. What purpose would be subserved by the provisions of section 683 requiring the foreign corporation to state in its report "the value of the property owned and used by the company in Nebraska, where situated, and the value of the property owned and used outside of Nebraska and where situated," unless it had some relation to the computation of the tax, the amount of which is determined, with reference to both domestic and foreign corporations, from the statements contained in their respective reports? If the calculation was, in each case, to be made merely upon the basis of paid-up capital, the provisions just quoted from the requirements of the report of foreign corporations would be entirely useless. A construction of a statute will not be adopted which results in the requirement of useless and of absurd acts except where its terms are positive and unavoidable. *State v. Cook*, 178 Mo. 189. Especially is this correct when those acts have no relation to the thing to be accomplished, as would be the case if defendant's construction were adopted.

Leaving out of consideration the maximum restriction of $2,500, a construction which would require, for example, the United States Steel Corporation with a capital of a billion dollars, though only $500,000 was employed in the state, to pay 20 times the occupation tax of a domestic corporation with paid-up capital of $500,000, would seem to be absurd, viewed as a compliance with the provision for paying the "same amount." With the restriction added, such construction would be equally absurd when applied to cases below the maximum. We cannot presume that by inserting these expressions the legislature did a vain thing; and we are not permitted to disregard any part of the en-

actment, but, if possible, must construe it so as to give effect to every word and phrase contained in it.

But there is further confirmation of the correctness of the construction we have adopted in the latter portion of section 697, above quoted, the language of which is as follows: "The secretary of state, or any person deputed by him *for the purpose of determining the amount of fees due from such corporation, shall have authority to investigate and determine the facts showing the proportion of the paid-up capital stock of the company represented by its property and business in Nebraska.*" (Italics ours.) This provision seems specially applicable to foreign corporations, only a portion of whose paid-up capital is used in the prosecution of its business in this state, and is consonant with the basic principles underlying the power to levy taxes above referred to.

Another argument strongly urged by plaintiff is that the continuous interpretation of the statute in question, placed upon it by the officers of the state charged with its enforcement, together with the fact that, notwithstanding such interpretation, although five sessions of the legislature have been held during that time, no attempt has been made to amend the law, is such an administrative and legislative construction upon the act as should be followed by the court. Such construction is of great persuasive force, and will ordinarily be adopted by the courts when it does not do violence to the language, purpose or policy of the act. *Douglas County v. Vinsonhaler,* 82 Neb. 810; *United States v. Minnesota,* 270 U. S. 181.

Defendent argues that, at the time fixed for filing the report, a foreign corporation might have "but a small amount of assets or capital stock employed in the state, and within a minimum period thereafter might employ all of their financial advantage against a competitor in this state," and therefore the construction we have adopted is unfair and discriminatory. This is an inherent difficulty in all tax laws. A time is fixed (April 1) at which returns of personal property for assessment shall be made,

which reaches only property owned at that time. After April 1 the taxpayer may acquire a large amount of property which will escape taxation unless he continues to hold it until the next return day. It can hardly be presumed that a foreign corporation will withdraw its capital from the state each year on June 30, so as to escape a reasonable occupation tax. In the natural order of things, as the business increases each year the tax will augment correspondingly. But this is a matter for legislative consideration. And, moreover, it is provided by section 699 that "a corporation shall not be required to file its first annual report under this article until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

We are clearly of the opinion that the law, properly construed, subjects to an occupation tax only that amount of the capital of foreign corporations actually employed in carrying on its business in this state. It will not be necessary to discuss the constitutional questions learnedly and exhaustively presented by the briefs.

There being no dispute as to the correctness of the amount tendered under the construction adopted by this opinion, the judgment of the district court is

AFFIRMED.

P. T. MCGERR, APPELLANT, V. HARRY P. BRADLEY, APPELLEE.

FILED FEBRUARY 1, 1929. No. 26395.

1. Taxation: DELINQUENT TAX SALES. A county treasurer selling real estate for delinquent taxes at either public or private sale should include only delinquent taxes previously advertised.
2. ———: ———: PRIVATE SALES. The revenue law authorizes a county treasurer to sell real estate at private sale for delinquent taxes levied and advertised for the previous year and not sold at public sale for want of bidders, though at the time of such private sale taxes for another year have become delinquent but have not been advertised.
3. ———: ———: ———. A county treasurer selling real

estate at private sale for delinquent taxes levied and advertised for the previous year, but not sold at public sale for want of bidders, should make the private sale subject to any taxes that became delinquent after the advertisement for the previous year but before a new advertisement could be published and before such private sale.

4. **Syllabus Overruled.** The first and second paragraphs of the syllabus in *Wight v. McGuigan*, 94 Neb. 358, overruled.

APPEAL from the district court for Chase county: CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

Helen McGerr, for appellant.

Scott & Scott, G. B. Hastings and *C. M. Skiles, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

ROSE, J.

This is a suit by P. T. McGerr, plaintiff, to foreclose tax liens on two tracts of land owned by Harry P. Bradley, defendant. The lands are situated in Chase county and are described respectively as the southeast quarter of section 11, township 8, north, range 37, west of the sixth principal meridian and the west half of section 13 in the same township.

The taxes for 1920 became delinquent and, pursuant to statute, the county treasurer, commencing the first week in October, 1921, published notice of the delinquency and advertised the lands for sale at the general tax sale to be held the first Monday in November, 1921. Comp. St. 1922, secs. 6050-6052. The delinquent taxes for 1920 not having been paid at the time fixed in the published notice, the land was regularly offered for sale according to statute but not sold for want of bidders. Comp. St. 1922, sec. 6054. The general tax sale was closed and the treasurer made his return thereof to the county clerk according to law. The county treasurer sold the land at private sale July 1, 1922, to plaintiff, who paid the delinquent taxes for 1920, penalties and costs, amounting on the quarter section to $29.10

and on the half section to $79. Comp. St. 1922, secs. 6061, 6062. July 1, 1922, the treasurer issued to plaintiff a tax sale certificate for each tract, evidencing the sales and reciting the payments made. Comp. St. 1922, secs. 6062, 6065.

Plaintiff, to protect his tax lien on the quarter section, paid in due time taxes in full for subsequent years as follows: 1921, $32.85; 1922, $30.18; 1923, $29.80; 1924, $29.60; 1925, $33.35. He likewise paid taxes on the half section as follows: 1921, $91.10; 1922, $83.98; 1923, $81.10; 1924, $46.40; 1925, $52.15. The facts outlined were pleaded at length in the petition.

The relief sought by plaintiff was the foreclosure of his tax liens, the allowance of interest on each item of taxes paid by him at the rate of 15 per cent. per annum and an attorney's fee equal to 10 per cent. of the amount found due. Comp. St. 1922, secs. 6068, 6089, 6091.

Defendant admitted generally the facts pleaded in the petition, but alleged that the tax sale certificates were void because the sale to plaintiff did not include the delinquent taxes for 1921; that plaintiff acquired only the public's interest in the items of taxes paid by him and that he was only entitled to recover the amount of each item with interest at the rate of 10 per cent. per annum and costs, but no attorney's fee.

The controversy between the parties was narrowed in the district court to the questioned validity of the tax sale certificates on the sole ground stated, an issue involving the right of plaintiff to recover interest at the rate of 15 per cent. per annum and an attorney's fee equal to 10 per cent. of the amount found due.

At the trial below defendant relied on the opinion in the case of *Wight v. McGuigan*, 94 Neb. 358, where the following rules were announced:

"When real estate is sold for taxes, all delinquent taxes thereon must be included in the sale.

"Real estate cannot be sold for taxes at private sale un-

less all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders."

The district court followed these rules and entered judgment in favor of plaintiff for the items in his claim with interest thereon at 10 per cent. per annum, disallowing an attorney's fee. Plaintiff appealed.

The revenue law does not provide that all delinquent taxes must be included in a private sale of land for taxes, nor that real estate cannot be sold for delinquent taxes at private sale "unless all taxes thereon then delinquent have been included in the notice of public sale, and the land has been duly offered at such public sale and not sold for want of bidders." The rules quoted extend the revenue law beyond its terms and would, if allowed to stand, defeat to a considerable extent the obvious legislative purpose, as shown by the statute, to provide a means of procuring for the public the prompt payment of delinquent taxes not collectable at public sale, by offering to individuals inducements to pay them at private sales of the lands taxed, when the taxes, for want of bidders at public sale, are not then available. The rules announced in the case cited would prevent private sales each year from the time taxes generally become delinquent on the first day of May until November. Private sales of real estate for delinquent taxes would be still further restricted in the city of Lincoln, where taxes become delinquent December 1.

The statutory requirement to include "all delinquent taxes" applies to the delinquent tax list, and not to private tax sale. Taxes on real estate generally become delinquent May first of each year. The revenue law provides:

"The county treasurer shall, not less than four nor more than six weeks prior to the first Monday of November in each year, make out a list of all lands and town lots subject to sale, and the amount of all delinquent taxes against each, with interest to the date of sale." Comp. St. 1922, sec. 6050.

Provision is made for notice of public sale. The treasur-

er is required to commence it at the appointed time and continue to offer the advertised lands until they are sold or are not sold for want of bidders. Comp. St. 1922, sec. 6054. Return of sale to the county clerk must be made by the treasurer on or before the first Monday in December. Comp. St. 1922, sec. 6061. The statute further provides:

"After the sale shall have closed, and the treasurer shall have made his return thereof to the county clerk, * * * if any real estate remains unsold for want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his office to any person who will pay the amount of taxes, penalty, and costs thereof." Comp. St. 1922, sec. 6062.

This provision does not require the county treasurer to include in private sale all taxes delinquent at the time. To import into that provision from the requirement relating to the published lists of taxes and lands the expression "all delinquent taxes" is inconsistent with the revenue law and with the wise legislative purpose to procure prompt payment of delinquent taxes by means of private tax sale of lands not sold at public sale for want of bidders. The statutory notice of public sale is notice also to delinquent tax debtors that their lands may be sold at private sale, if not sold at public sale for want of bidders. While "all delinquent taxes" must be included in the delinquent tax list and in the notice of public sale, a sale of land at private sale does not necessarily include all the delinquent taxes. This aspect of the revenue law was overlooked when the first and second paragraphs of the syllabus in *Wight v. McGuigan,* 94 Neb. 358, were adopted and for the reasons given they are overruled.

The private sales to plaintiff in the present suit were valid. The judgment below is therefore reversed and the cause remanded to the district court, with instructions to enter a decree conforming to the prayer of plaintiff's petition.

REVERSED.

ULYSSES S. G. SHIRLEY, APPELLANT, V. HARLAN COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1929. No. 26235.

1. **Highways**: ESTABLISHMENT: DUTY OF COUNTY SURVEYOR. Where a county board, pursuant to the provisions of section 2566, Comp. St. 1922, has sought by resolution to establish a road, the county surveyor, acting pursuant to the provisions of section 2569 *et seq.*, Comp. St. 1922, in viewing and reporting upon the expediency of establishing such road, is required to form an independent judgment and to exercise a judicial function.
2. ———: ———: COUNTY SURVEYOR: DISQUALIFICATION. Where a county surveyor is also a member of the county board, and as a member of such board votes for a resolution establishing a highway, pursuant to section 2566, Comp. St. 1922, he has passed judgment upon the expediency of establishing such highway and has thereby disqualified himself from acting as a commissioner to view and pass upon the expediency of the road, as provided by section 2569 *et seq.*, Comp. St. 1922.
3. ———: ———: ———: INVALIDITY OF ACTS. Where a county surveyor is incompetent to act as a commissioner to view and pass upon the expediency of establishing a highway, pursuant to the provisions of section 2569 *et seq.*, Comp. St. 1922, and attempts so to do, his act is invalid, and the result is the same as if no examination or report had been made by the commissioner.
4. ———: ———: JURISDICTION. "A county board has no jurisdiction to establish a public road, when no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land is sought to be taken for that purpose is filed with the county clerk." *Warren v. Brown*, 31 Neb. 8.
5. **Eminent Domain**: AGREEMENT WITH OWNER: STATUTE MANDATORY. Where a statute requires that an attempt to agree with the owner shall first be made before the institution of condemnation proceedings to take private lands for public use, such provision is mandatory, and condemnation proceedings, instituted without first making a *bona fide* attempt to agree with the owner, are void.

APPEAL from the district court for Harlan county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed, with directions.*

O. E. Bozarth, for appellant.

O. E. Shelburn, contra.

O. S. Spillman, Attorney General, George W. Ayres, Butler & James and *Perry & Van Pelt, amici curiæ.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ., and REDICK, District Judge.

GOOD, J.

This is an action to enjoin the county of Harlan and its officials from entering upon and opening up a highway through the plaintiff's premises. The grounds on which the relief is sought are that the county has not acquired a right of way for the highway. It is charged specifically that, in the proceedings by which the county sought to obtain the right of way, it has not complied with various sections of the road law, as contained in article I, ch. 23 (secs. 2563-2620) Comp. St. 1922, and further that, in the attempted appraisement of damages for the right of way, the county has attempted to proceed under chapter 56, Laws 1927; that it had not complied with the provisions of said chapter, and that it is unconstitutional and void.

Defendants answered, in which they set forth the proceedings by which the county claims that it has acquired or was acquiring the right of way for the highway. The reply denied new matter set up in the answer. A trial of the issues resulted in a finding and decree for defendants. Plaintiff has appealed.

The record discloses that plaintiff is the owner of a 200-acre farm in Harlan county; that the Chicago, Burlington & Quincy Railway runs through the northeast corner of the farm, leaving slightly more than 4 acres on the northerly side of the railway; that this 4-acre tract is occupied by plaintiff for a building site, whereon he has his dwelling, barn, many outbuildings, well, cistern, silos, and a large number of forest trees; that the proposed highway is to run through this 4-acre tract, parallel to and 33 feet distant from the railroad, and, if established, will cause the destruction of about 100 of plaintiff's trees, four of his

silos; greatly interfere with the convenient occupancy of the premises and require him, in conducting his farm operations, to cross this public highway, as well as the railroad, to reach the major portion of his farm, which lies on the southerly side of the proposed highway and the railroad.

It appears from the record that the board of supervisors of Harlan county, on the 10th of May, 1927, adopted a resolution, which recites that the department of public works of the state has suggested and directed the establishment of the highway hereinafter described; that the board has considered the matter and, in its judgment, deems it expedient to locate and establish a public road parallel to and within 500 feet of the right of way of the Chicago, Burlington & Quincy Railway and distant 33 feet therefrom. The resolution gives the termini of the proposed road, and concludes as follows: "Be it therefore further resolved that said public road, as above described, be and the same hereby is established."

On the same day the county board, by motion, instructed the county attorney to institute such proceedings as may be necessary for the appropriation and condemnation of the real estate, necessary for the right of way for the road established by the foregoing resolution. Immediately after the passage of the resolution the county clerk of Harlan county issued a commission to Edward E. Johnson, the county surveyor of said county, to view and report upon the practicability of the line of road sought to be established by the resolution of the county board, and in the commission the resolution was set forth. Johnson, the surveyor, took the oath, viewed the premises and made a report, which contained an estimate of expenses and damages which would be sustained by the plaintiff, and setting forth therein the following: "The above road to my opinion is a necessity, as without it there would be no federal aid on the Golden Rod highway in Harlan county this summer, and the county has not enough money in the general fund to purchase the right of way on any other location

the federal government would approve." This report was also filed on the 10th of May, 1927.

On the 11th day of May, 1927, Harlan county filed in the county court an application for the appraisement of damages, if any, to be sustained by the plaintiff by reason of the location and establishment of said highway, and asking that three disinterested freeholders be summoned, as provided by chapter 56, Laws 1927, to assess said damages and report the same to the county court. No previous attempt had been made by the county board to agree with the plaintiff as to the amount of damages he would sustain on account of the appropriation of his land for public use. Pursuant to the application, the county judge appointed three persons, who were summoned and qualified, and the appraisers gave notice to the plaintiff of the time and place of hearing to assess and determine damages; whereupon plaintiff instituted this action. It further appears that Edward E. Johnson is a member and chairman of the board of supervisors of Harlan county, and is also occupying the office of county surveyor of said county.

Article I, ch. 23 (secs. 2563-2620) Comp. St. 1922, and particularly section 2566 and the following sections, provide the method of establishing highways. Section 2566, after first providing for initiation of such proceedings by the filing of a petition, signed by ten electors within five miles of the road proposed to be established, contains the following: *"Provided,* that whenever in the judgment of the board of commissioners or board of supervisors of any county it shall be deemed expedient to locate a public road parallel to the right of way of any railroad company, and distant therefrom not more than five-hundred feet, said road may be established by said county board or board of supervisors by resolution without the submitting of a petition as herein provided. When such road is established by the board, and the resolution establishing the same is filed with the county clerk, he shall proceed in all respects as if said road had been established by petition."

Section 2567, Comp. St. 1922, requires, where the road is sought to be established by petition, that the petitioners shall deposit a certain sum of money to pay the expenses in the event the road is not finally established. Section 2568 is as follows: "Upon compliance with the foregoing provisions, and whenever a legal petition or *resolution* of the county board, as herein provided, is filed with the county clerk, he shall notify the county surveyor to view and to report upon the expediency of the proposed road, alteration or vacation." (Italics supplied.)

Prior to 1917, section 2568, as it then existed, provided that the county clerk should appoint a disinterested and qualified elector in the county as a commissioner to view and report on the expediency of the proposed road. Section 2569 *et seq.* relate to the powers and duties of the commissioner. These sections were not amended to substitute the words "county surveyor" for commissioner, but, since there is no other commissioner than the surveyor, it seems clear that the word "commissioner," as used in section 2569 *et seq.*, should be construed to mean the county surveyor. The county surveyor *ex officio* becomes the commissioner to view, examine and report upon the expediency of the establishment of the highway.

One of the objections raised by the plaintiff is that Johnson was incompetent to act as county surveyor and *ex officio* commissioner to view and pass upon the expediency of establishing the highway, for the reason that he was a member of the county board and, in the adoption of the resolution, had already passed upon the expediency of establishing the highway. The record does not advise us as to whether Mr. Johnson first became a member of the board of supervisors and afterwards surveyor, or whether he first became county surveyor and afterwards a member of the board of supervisors. His right to hold the two offices, of course, is not involved in this action.

This court held in *State v. Wait*, 92 Neb. 313, that one cannot hold two offices, the duties of which are incompatible, and specifically held: "It is a well-settled rule at

common law that if a person, while occupying one office, accepts another incompatible with the first, he, *ipso facto*, vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." This court has frequently held that a member of a city council or board of village trustees is disqualified from voting upon a proposition to grant a saloon license to an applicant where the member of the council or board of trustees had signed the applicant's petition for a license, and, further, that the subsequent erasure and withdrawal of his name from the petition would not qualify him to act as a member of the board granting the license. *State v. Kaso*, 25 Neb. 607; *Foster v. Frost*, 25 Neb. 731; *Powell v. Egan*, 42 Neb. 482; *Rosenberg v. Rohrer*, 83 Neb. 469. The reason for this holding is that in voting to grant the license he acts in a judicial capacity, and, having prejudged the question by signing the applicant's petition, he has thereby disqualified himself from ever acting as a member of the board in granting a license to the particular applicant. *Rosenberg v. Rohrer, supra.*

Section 2570, Comp. St. 1922, requires the surveyor and *ex officio* commissioner, in forming his judgment, to take into consideration both public and private convenience and the expense of the proposed road. Section 2571 provides that, if he shall not be in favor of establishing the proposed road, he shall so report, and no further proceedings shall be had. Section 2572 authorizes him, if the road is for the public good and he can determine the precise location of the same and deems it expedient, to proceed to lay out the road and report accordingly.

It seems clear that the statute contemplates that the county surveyor *(ex officio* commissioner) shall form an independent judgment in determining the expediency of finally establishing the road. In fact, as appears, he is, under certain conditions, the final arbiter in determining whether the road shall be established. He is, therefore, required to exercise a judicial function.

We think the principles laid down in cases above cited are applicable to the present situation. As a member of the board of supervisors, Johnson voted for the resolution, seeking to establish the highway. He thereby committed himself and passed judgment upon the expediency of establishing the highway. Under the law, the matter was then referred to the county surveyor to view and make a report as to the amount of damages that would be sustained by plaintiff, and whether it was expedient to establish the road in a particular location, or to vary somewhat from it. In this matter, the county surveyor, as *ex officio* commissioner, was required to exercise a judicial discretion in performing his duty. As a member of the board of supervisors he had prejudged the question and was therefore incompetent to act as surveyor or commissioner to view the premises and decide upon the expediency of establishing the highway. The chairman of the county board was not competent to act in this capacity. There was, therefore, no valid examination or report. The situation is the same as if no examination or report had been made.

In *Warren v. Brown*, 31 Neb. 8, it is held: "A county board has no jurisdiction to establish a public road, when no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land is sought to be taken for that purpose is filed with the county clerk."

Another objection to the validity of the proceedings raised by the plaintiff is that the county court was without jurisdiction to appoint any appraisers to assess the damages that plaintiff would sustain by the appropriation of his land, because no previous attempt had been made by the county or its officials to agree with plaintiff as to the amount of damages which he would sustain by reason of the appropriation of his land.

The defendant county, in attempting to have assessed the damages which plaintiff would sustain, proceeded under chapter 56, Laws 1927. Section 3 of that act provides: "If the owner of any real estate shall refuse to agree with

the county board as to the amount of the damages sustained by him on account of the appropriation of his land for public use by the county, the county judge of the county in which such real estate may be situated, shall, upon the written application of either party, direct the sheriff of said county to summon three disinterested freeholders of the county, and not interested in a like question, whose duty it shall be to carefully inspect and view the real estate sought to be appropriated." As above noted, no attempt was made to reach an agreement with the plaintiff as to the damages he would sustain by reason of the appropriation of his land. This was a condition precedent to making an application to the county court for the appointment of appraisers.

Where a statute requires that before the institution of condemnation proceedings to take private lands for public use, an attempt to agree with the owner shall first be made, such provision is mandatory, and the condemnation proceedings are void in case no attempt is made, before beginning them, to come to an agreement with the owner. 20 C. J. 892, sec. 317. In 20 C. J. 895, sec. 318, it is said: "In order to satisfy statutory requirement, there must be a *bona fide* attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it." See, also, *Rogers v. Cosgrave*, 98 Neb. 608; *Trotier v. St. Louis, B. & S. R. Co.*, 180 Ill. 471.

This court was not favored by a brief or oral argument on behalf of the defendants. The plaintiff challenges the constitutionality of chapter 56, Laws 1927. The attorney general, as a friend of the court, has filed a brief in which he contends that the statute is constitutional. Other counsel have filed briefs as friends of the court in which they also attack the constitutionality of said chapter 56. The conclusion we have reached on the assignments of error herein discussed renders it unnecessary to consider or pass upon the constitutionality of chapter 56, Laws 1927.

Because of the fact that the county surveyor was disqualified to act as a commissioner, all proceedings thereafter are utterly void. The county has not perfected the right to appropriate the land, and, even had it perfected such right to proceed with condemnation proceedings, it could not inaugurate such proceedings until a good-faith effort had been made to reach an agreement with the plaintiff as to his damages. This was not done.

It follows that the judgment of the district court should be and is reversed, and the cause remanded, with directions to grant the injunction as prayed.

REVERSED.

IN RE ESTATE OF CLARA B. FORT.
EDNA M. FLOOD ET AL., APPELLANTS, V. CLAY COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1929. No. 26245.

1. **Taxation**: INHERITANCE TAX: APPRAISAL. Record examined, and *held* that the basis adopted by the trial court in appraisal of land for inheritance tax purposes was its cash value as of the date of the owner's death.
2. **Evidence** examined, and *held* to support the judgment of the district court.
3. **Taxation**: INHERITANCE TAX: INTEREST. Section 6155, Comp. St. 1922, requires interest to be charged on all inheritance taxes from the time they accrue until paid, unless such taxes are paid within one year from the time they accrue.
4. ———: ———: APPEAL: COSTS. Where the beneficiaries under the will of a decedent appeal to the district court from the assessment of inheritance taxes by the county court, and on such appeal obtain a substantial reduction in the amount of tax assessed, they should not be taxed with the costs in the district court.

APPEAL from the district court for Clay county: WILLIAM A. DILWORTH, JUDGE. *Affirmed in part, and reversed in part.*

Fort & Fort, Stiner & Boslaugh and *Edmund Nuss*, for appellants.

D. B. Massie and *Guy Hamilton, contra.*

Heard before GOSS, C. J., ROSE, GOOD, THOMPSON and EBERLY, JJ.

GOOD, J.

From an assessment of an inheritance tax against the property devised to them by the will of Clara B. Fort, the beneficiaries under the will have appealed.

This proceeding originated in the county court of Clay county, and from the assessment of the inheritance tax an appeal was taken to the district court. On a trial *de novo* in that court, the amount of the tax, assessed by the county court, was materially reduced. The beneficiaries still being dissatisfied have appealed to this court. The property subject to the inheritance tax consisted of real estate in Clay, Fillmore, Nuckolls, Cheyenne and Deuel counties. Only the assessment for Fillmore and Clay counties is involved in this appeal.

It is argued that the trial court did not adopt the proper basis of valuation; that the court took as a basis of assessment the value or market value of the property and not the "then cash value" thereof. It is conceded that the proper basis is the cash value of the property at the date of the owner's demise, which in this case was the 18th day of March, 1926. The contention in the instant case is based upon some of the language used by the court in its findings. All of the evidence, however, on behalf of the counties was as to the cash value of the property on the 18th of March, 1926, the date of Mrs. Fort's death.

A careful scrutiny of the court's findings discloses that some loose expressions are used therein, but, on the whole, it sufficiently appears that the basis of value, as found by the trial court, was the cash value at the date of Mrs. Fort's death. This was the proper basis. *In re Estate of Woolsey*, 109 Neb. 138. The contention made is not borne out by the record.

It is strenuously urged that the appraisal of the real es-

tate was entirely too high and that, since the amount of the tax depends upon the appraised value, it resulted in imposing an excessive inheritance tax.

We have carefully examined the entire record, consisting of several hundred pages. The evidence discloses a very wide diversity of opinion, as to the value of the land, between the witnesses called for the beneficiaries under the will and those called by the interested counties. However, the evidence on behalf of the interested counties tends to support a valuation somewhat in excess of that found by the trial court, while the evidence on behalf of the beneficiaries would tend to show that the value of the property at the date of Mrs. Fort's death was much less than that found and determined by the trial court.

It appears that five witnesses, used by the beneficiaries, some four weeks previous to the trial and more than a year after the death of Mrs. Fort, for the purpose of testifying as to the value of the property, viewed the lands involved; that on this occasion 10 or 11 hours were spent in viewing 19 different tracts of land, several of these tracts containing each 640 acres; that they traveled 130 to 140 miles by automobile in viewing these lands and took, at least, sufficient time out of the day for the midday meal. It is apparent that the examination made must have been very superficial. It is true that some of the witnesses had a general knowledge of the land prior to the time they viewed it, but some of the questions involved were as to the amount of low or lagoon land on the several tracts, and another question of fact was as to whether certain portions of the land were infested with noxious weeds. Moreover, some of the witnesses for the beneficiaries, in effect, stated that there was no market value for the land at the time of Mrs. Fort's death; that in arriving at the then cash value they had taken, as a basis, the cash market value of the land several years before, deducting from that value 40 per cent. for depreciation in land values generally, to arrive at the market value, and further reducing by the sum of $25 an acre, to obtain the then cash value.

Such evidence, we think, is entitled to but little weight, and no doubt the trial court so found.

After the evidence was all adduced, at the request of the parties litigant the judge personally viewed and examined all of the lands that were involved in this appeal, and, after his examination, he made his findings. The trial judge had a better opportunity of determining the value of the evidence of the several witnesses, since they were before him and he saw their manner of testifying, and he had the further advantage of viewing the premises. Suffice it to say that after an examination of the record we are satisfied that the findings of the trial court, as to the cash value of the lands at the date of Mrs. Fort's death, are fully supported by the record.

The beneficiaries under the will complain because the judgment required them to pay interest upon the amount of the inheritance tax from the date of Mrs. Fort's death. Section 6155, Comp. St. 1922, which provides for interest on inheritance taxes, is in part as follows: "All taxes imposed by this article, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of seven per cent. per annum shall be charged and collected therefrom for such time as such taxes are not paid: *Provided,* if said tax is paid within one year from the accruing thereof, interest shall not be charged or collected thereon." Appellants argue that, since an appeal was pending and the exact amount of the tax had not been determined, they could not pay the tax, and for that reason they ought not to be required to pay interest thereon until the correct amount of tax is finally determined.

The contention is not sound for two reasons: First, the language of the statute requires that interest be paid on all taxes from the date of the death; and, second, the statute provides for an exemption from interest on tax if paid within one year. In order to exempt themselves from interest on taxes, the beneficiaries must bring themselves within the language of the proviso. This they have failed

to do. Moreover, as is pointed out in the opinion in *In re Estate of Woolsey,* 113 Neb. 218, the inheritance tax statute provides that, if an erroneous tax is collected, the ones entitled thereto may recover it by filing an application within two years. The situation in that case is somewhat similar to the one in the instant case. In the *Woolsey* case, however, an appeal was taken from the assessment of inheritance tax, as made by the county court, and prior to the determination of the appeal the beneficiaries paid the amount of the tax as fixed by the court, paying part of it, however, under protest. The question then arose as to their right to recover the excess or erroneous tax, and the court held that the beneficiaries were entitled to recover such excess. In the instant case, if they desired to relieve themselves from the interest, the beneficiaries could have paid the entire amount of tax, as assessed in the county court, and, at any time within two years thereafter, as provided by section 6162, Comp. St. 1922, could have recovered any excess over the amount that was finally determined to be due. The statute clearly requires the payment of interest from the date of the death of the owner of the property, unless such tax is paid within one year from the time it accrues.

It is finally contended that the court erred in taxing the costs of the proceedings to the beneficiaries, or to the estate of Mrs. Fort. Section 6163, Comp. St. 1922, relating to costs in inheritance tax cases, *inter alia,* provides: "Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, conditioned upon the giving of security to the court to pay all costs, together with all taxes that may be fixed by the court." It is further provided in said section that the appraisers shall be paid a reasonable fee by the county treasurer out of the funds he may have in his hands, on account of such tax, on the certificate of the county judge. The statute also fixes the amount which shall be allowed to witnesses

and officers serving process, and then provides: "All costs made or incurred under this article shall be paid by the county treasurer out of any funds he may have in his hands on account of such tax, on certificate of the county judge."

It is difficult to understand why the legislature, as a condition to appeal, should require one who is dissatisfied with the appraisement of property for inheritance tax purposes to give a bond to pay the costs and at the same time require such costs to be paid by the county treasurer. The provisions seem inconsistent. It is possible it was intended that the costs of the appraisement in the proceedings in the county court should be paid by the county treasurer, and not intended to relate to costs which might accrue upon appeal to the district or supreme courts. The statute does not, in any event, require the payment of costs by the heirs or beneficiaries under the will of a decedent, and their liability, if any exists, must be found in the general statutes relating to the taxation of costs.

It appears that the beneficiaries of Mrs. Fort's will, by appealing from the tax assessed in the county court, secured material and substantial relief in the district court. It was there determined that the property was assessed too high and that they had been required to pay an excessive tax. Conceding that, under the general statutes, it was within the discretion of the court to determine whether the costs should be taxed to one party or the other, or should be apportioned between them, we think it would be unjust to penalize the beneficiaries by requiring them to pay the costs in seeking and obtaining the relief to which they were entitled. The costs in the district court should have been taxed to the interested counties.

Since the only relief which the beneficiaries have obtained by their appeal to this court relates to the taxation of costs, and since that question could have been presented in a proceeding for that purpose alone, they should not be entitled to recover all of the costs in this court.

The judgment of the district court is affirmed, except as to the judgment for costs in that court, which is reversed

and the cause remanded, with directions to the district court to render judgment for costs in that court against the appellees; the appellants and appellees to pay the costs by them respectively incurred on this appeal.

AFFIRMED IN PART, AND REVERSED IN PART.

STATE, EX REL. O. S. SPILLMAN, ATTORNEY GENERAL, V. CITIZENS STATE BANK OF CHADRON, APPELLEE: CROSSMAN, MUNGER & BARTON, INTERVENERS, APPELLANTS.

FILED FEBRUARY 1, 1929. No. 26287.

Banks and Banking: GUARANTY FUND: PREFERENCES. Where attorneys were employed by a bank to collect debts owing to such bank, and after the services were rendered the guaranty fund commission took charge of the bank and later a receiver was appointed, such attorneys are not entitled to an equitable lien on the assets of the bank and a preference before other general claims or claims of depositors, because their services were the means of procuring certain property which the bank acquired before the guaranty fund commission took charge of the bank.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Crossman, Munger & Barton, pro se.

C. M. Skiles and *I. D. Beynon, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

The Citizens State Bank of Chadron in June, 1923, employed the firm of Crossman, Munger & Barton, attorneys, to collect certain securities held by the bank against one Belsky, who owed the bank large sums of money on several notes, a part of said notes being secured by second mortgages on land and personal property and part were un-

secured. The attorneys, pursuant to that employment, secured the dismissal of a foreclosure of the first mortgage, and with the consent of Belsky foreclosed the bank's second mortgage on the land and also the chattel mortgage. In both cases the bank bought the property under the foreclosure sales, subject to the first mortgage on the real estate. The foreclosure sale on the real estate was confirmed on January 26, 1925, and sheriff's deed issued to the bank, and the personal property sold on February 26, 1925, under the foreclosure of the chattel mortgage to the bank. As part of the transaction by which the said Belsky consented to the foreclosures, it was agreed between the bank and Belsky that, if Belsky would assist in facilitating the foreclosures, the bank would give Belsky a lease for a term of years on the land, with option to repurchase the land. The lease had not been executed by the bank to Belsky when the guaranty fund commission took charge on March 9, 1925. The terms of this lease were not familiar to the commission, and their agent wrote to the interveners to inquire about the agreement to be incorporated into the lease. The interveners, on March 31, 1925, wrote to Citizens State Bank, "Attention Mr. J. B. Lacy" (the agent in charge for the commission). This letter recited in a general way the details of the various actions and proceedings in the cases. This letter states in part: "We have completed all matters in connection with the foreclosure of the real estate mortgage upon the ranch and sheriff's deed has been issued to the bank for this property, subject to the $32,000 mortgage of Woods Brothers. We bought in this property in the real estate foreclosure at less than the face of our indebtedness and then proceeded to foreclose the chattel mortgage, so that the title to the ranch and the title to all the personal property and equipment upon the ranch is now in the Citizens State Bank of Chadron. We had just completed this matter a few days prior to the time that the department took over the bank and sent our final bill for services in the amount of $750, which you will find in the files. * * * Inasmuch as

our services have been completed, we wish you would kindly place our bill for services * * * in line for payment." A letter was also written March 30, 1925, by Mr. Lacy, asking for abstracts which interveners had. Another letter was written by interveners on April 8, 1925, giving more in detail the terms of the lease to be executed to Mr. Belsky and which the guaranty fund commission had agreed to make in accordance with the understanding with Belsky at time of the foreclosures. Mr. Lacy, the agent for the commission, later prepared the lease. The sheriff's deed to the property could not be found in the bank, and Mr. Lacy wrote to interveners to send the deed, which was done, and interveners sent to Mr. Lacy a note of $15,000, which they had in their possession, signed by Ila and Guy Belsky, and which, in the foreclosure proceeding, it had been agreed should be canceled. This was sent June 3, 1925. A receiver was appointed in July, 1925. Mr. Lacy, the agent, testified that he never employed the interveners, and the correspondence above stated was merely for the purpose of learning what had been done by the interveners in respect to the matters mentioned. After the receiver was appointed he sold the ranch and personal property and received certain sums as rent from the ranch.

In December, 1924, the interveners sent the bank a bill for their services in the sum of $1,250 and were paid $500 by the bank. No other or later claim was filed, and in December, 1926, the receiver placed the claim of interveners in the classification of general creditor. Interveners then filed their petition claiming an equitable lien on the assets of the bank and asked to have their claim of $750 preferred in rank to the claims of creditors and depositors.

The district court found that the services of interveners were performed for the bank prior to the time the bank was adjudged insolvent and that interveners were not entitled to an equitable lien as claimed, and the court refused the prayer for the equitable lien, but allowed the fee as a general claim. Interveners appealed to this court.

From the facts disclosed, it is apparent that interveners had closed their services for the bank before the bank was taken over by the commission. The bill they rendered in December, 1924, indicates that they were expecting their pay from the bank, and not from any particular property or fund. The correspondence had with the commission's agent was not for the purpose of having any other or new services performed, but solely to get information as to some of the details as to what had been done while they were acting as attorneys. Their own letter unequivocally states that their matters had been concluded. They did not file a new claim with the receiver, nor does the claim itself refer to any services performed after the commission took possession of the bank. They did not file or give notice to the bank or the commission of any claim to an attorney's lien on the real estate foreclosed.

The interveners claim right to the equitable lien and preference, upon the general principle that one jointly interested with others in a common trust fund, who in good faith at his own expense maintains the necessary litigation to save it from waste and destruction and restores it for the purpose of the trust and its proper application, is entitled in equity to reimbursement of his costs and expenses out of the fund itself. This is a wholesome equitable principle and in a proper case should be followed, but the facts in this case do not bring it within that rule.

Interveners cite the cases of *In re Estate of Creighton*, 93 Neb. 90, *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834, and *State v. Wayne County Agricultural Society*, 101 Neb. 427, among other cases, as authority for their claim.

In the *Creighton* case the attorney general employed attorneys, as the statute empowered him to do, to defend in a will contest involving a public charitable trust. The attorneys were informed by the attorney general that the state would not pay for their services and that they would have to receive their pay from the fund recovered. The attorneys, with that understanding, agreed to and did represent the interest of the trust fund and succeeded in

procuring judgment for a large sum for the charity named in the will and were without any legal means of obtaining compensation except from that fund, and they were rewarded for their services from the fund so recovered. Judge Sedgwick, in that opinion, quotes from *Trustees v. Greenough*, 105 U. S. 527, 532: "Where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement." And the opinion goes on to state: "These attorneys were not themselves interested in the trust fund, but the state was, and in his official capacity was also the attorney general. These attorneys then represented parties in the trust fund, without any legal means of obtaining compensation except from that fund."

In the case of *Stone v. Omaha Fire Ins. Co.*, 61 Neb. 834, the board of directors of the insurance company which became insolvent, for the purpose of procuring the appointment of a receiver to conserve the assets of the corporation for the benefit of all the stockholders, engaged attorneys to institute proper proceedings therefor, and a receiver was appointed. This court held that their services came within the principle announced in *Trustees v. Greenough*, 105 U. S. 527. The *Wayne County* case, *supra*, was, in a general way, similar to the *Stone* case.

There is no similarity in the facts in this case to the conditions in the cases cited. There was no trust fund, and at the time the services were rendered no one had any interest in the securities except the bank.

The bank, while a going concern, and presumably solvent, employed interveners to foreclose or collect the notes, which they performed for the bank while it was still in operation, and as it plainly appears expected to be paid for their services by the bank. They had no agreement with the bank to be paid out of the proceeds of the litigation, filed no claim for lien on the judgment, nor made claim for such lien to any one before the receiver was ap-

pointed. There is an entire lack of equity in their claim for preference.

The decree of the district court should be, and is,

AFFIRMED.

WILLIAM F. SHEAR, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

FILED FEBRUARY 1, 1929. No. 26309.

1. States: LIABILITY FOR TORTS OF AGENTS. Where the legislature has not by law provided for the recovery by an individual or corporation against the state for damages caused by the negligence of an officer, agent, or employee of the state, there can be no recovery for such negligence until the legislature expressly by law makes the state liable therefor.
2. ———: ———: AUTHORIZATION TO SUE. A resolution by one branch of the legislature, authorizing an individual to maintain action against the state to recover damages caused by the negligence of a state employee, does not render the state liable for the negligent acts of its employee, in the absence of a statute making the state liable therefor.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

E. J. Robins and *Charles H. Yost,* for appellant.

O. S. Spillman, Attorney General, and *Lloyd Dort, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and BEGLEY and RAPER, District Judges.

RAPER, District Judge.

This is an action for damages sustained by plaintiff, caused by the alleged negligence of the agents of the state in placing an obstruction in a highway which was exclusively under the control and maintenance of the state through its highway department, and thereby causing plaintiff's car to overturn and injure him and his car. The action was authorized by a resolution of the senate,

which purports to give authority to the plaintiff to prosecute his suit to final judgment in the district court for Dodge county, for the purpose of ascertaining and adjudicating his claim and the liability of the state for the payment thereof. The state interposed a general demurrer, that the petition does not state a cause of action against the defendant. This demurrer was sustained and plaintiff's action dismissed. Plaintiff appeals.

The district court did not state the grounds upon which the demurrer was sustained, but appellant in his brief states that the court held that one branch of the legislature was without authority to waive the sovereignty of the state; that the resolution gave only the right to sue, and did not take away from the state the defense of sovereignty; that there is no right of action at common law and no constitutional provision or statute making the state liable.

It may be laid down as a universal rule that a state is not liable to a person injured by the negligence of its employees, unless there is a statute or constitutional provision permitting recovery therefor, so it becomes necessary to determine what authority the legislature and Constitution have granted as to such demands.

Section 22, art. V of the Constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."

This provision is not self-executing and requires legislative action to make it effective, and no suit could be maintained against the state until the legislature, by law, made provision therefor.

In 1877 the legislature passed an act entitled "An act to provide in what courts the state may sue and be sued," being section 1100, Comp. St. 1922. It grants jurisdiction to the district courts to hear and determine: "First. All claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed. Second. All claims or petitions for relief that may be presented to

the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication." The plaintiff claims that this statute, and the resolution of the senate, waive the defense of sovereignty and is sufficient to give right of recovery to the plaintiff on his cause of action for negligence.

This precise question has not been decided by this court, but there are a number of decisions which the appellant insists control this case and give to him the right to recover. He cites *Lancaster County v. State*, 74 Neb. 211, *Lancaster County v. State*, 97 Neb. 95, *Benda v. State*, 109 Neb. 132, and *City of Chadron v. State*, 115 Neb. 650. The first two of these cases were brought against the state to recover money which had been erroneously paid under mistake of fact to the state treasurer, and the *Commonwealth Power Co. v. State*, 104 Neb. 439, was likewise a case to recover from the state money which had been paid to the secretary of the state board of irrigation under a mistake of fact. The court held in each of those cases plaintiff could recover the money so paid to the state, under the facts shown. The sovereignty of the state does not appear to have been questioned in the opinions in those cases. The *Benda* case was decided against him, solely on the ground that the state's agents were trespassers, were not engaged in the state's business at the time the wrong was committed, and therefore the state was not liable. In the *City of Chadron* case, the city water conduit was laid under a state highway and the state's agents in grading the road removed and took and destroyed that part of the water pipes that were within the highway. The city claimed damages for the part taken and destroyed and also other damage that accrued to other parts of its water system, because of the removal of that part in the highway. This court permitted recovery for the value of the water pipes actually taken by the state's agents, but refused to allow any other damage. Thus, that case seems to have been decided upon the principle of the *Lancaster County* cases

that, where state had taken or received property wrongfully, the state was liable for the amount so taken and received. The refusal of the court to allow damages or recovery beyond the value of the water pipes taken is significant.

There is no statute making the state liable for the negligence of its employees. The senate resolution authorized the plaintiff to maintain the suit for the purpose of ascertaining, determining and obtaining an adjudication of his claim and the liability of the state for the payment thereof. Even if one branch of the legislature could by resolution (which is not conceded) render the state liable for the negligence of its agents, the resolution of the senate falls far short of any attempt to make the state liable for such negligence. The resolution simply gave the right to bring the action, but did not create a cause of action. By virtue of its sovereignty, there was no obligation or duty on the state to respond in damages for the negligence of its agents.

The effect of the constitutional provision and section 1100, Comp. St. 1922, and the resolution of the senate is very clearly stated in 36 Cyc. 915:

"By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not previously recognized. It merely gives a remedy to enforce a preexisting liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense."

It has been contended that when the legislature uses the word "claims," as expressed in section 1100, it included a claim for tort or negligence. The Massachusetts supreme court, in *Murdock Parlor Grate Co. v. Commonwealth*, 152 Mass. 28, which was an action for tort, construing a statute which gave jurisdiction to the supreme court of "all claims against the Commonwealth, whether at law or in equity," uses this language: "While the words 'all claims' may, in their colloquial use, include a

demand for damages occasioned by a tort to person or property, in its more proper judicial sense it is a demand of some matter as of right made by one person upon another for some particular thing, or compensation therefor, or to do or to forbear to do something as a matter of duty"—and the court held in that case that their statute did not permit a recovery against the state for damages resulting from misfeasance or negligence of its officers and agents.

Wisconsin has a statute which provides that it shall be competent for any person deeming himself aggrieved by the refusal of the legislature to allow any just claim against the state to commence an action against the state by filing a complaint, etc., and their supreme court held, in *Houston v. State*, 98 Wis. 482, that the statute relates only to claims which, if allowed, render the state a debtor to the claimant, and does not include a demand based upon unlawful or tortious acts of officers and agents of the state.

Such distinction has been recognized in all those cases where recovery had been permitted against this state, although not directly expressed in the opinions in those cases, and particularly in the *City of Chadron* case, where, if this court had construed the resolution of the House as granting right of recovery for the tort, consequential damages could have been allowed the same as in actions between individuals.

The legislature has not by law granted to any one the right to recover against the state damages for negligence of any of its officers, agents, or employees, and until such legislation is enacted, no recovery against the state can be had for such negligence. A resolution of one branch of the legislature, even if sufficient to permit suit, does not render the state liable for such negligence, and it therefore follows that the district court properly sustained the demurrer and dismissed plaintiff's action, and its judgment is

AFFIRMED.

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1. An attorney may not represent a former client's adversary in litigation between them involving the same adverse interests. *Baker v. Farnsworth* 504
2. A litigant may not secure fruits of a decree obtained by an attorney whom he knows previously represented his adversary in the same subject-matter. *Baker v. Farnsworth* 504
3. A decree secured, over objection, for litigant knowing of prior employment of his attorney by his adversary, where the subject-matter is the same, will be reversed without considering other errors. *Baker v. Farnsworth* 504
4. Public policy forbids an attorney from representing a party, over objection, where the subjects are the same or related, against an adversary whom he previously served. *Baker v. Farnsworth* 504
5. Courts have an inherent duty to impress on members of

the bar the duty of holding as sacred that confidence which exists between attorney and client. *In re Estate of Strelow* 168

Bail. SEE BONDS. CONSTITUTIONAL LAW, 1, 2.

1. The district court may forfeit a recognizance given in a criminal prosecution before an examining magistrate without first giving personal notice to the accused or his sureties. *State v. Painter* 42
2. The court cannot summarily render judgment on a forfeited recognizance against the accused or his surety; recovery must be by civil action. *State v. Painter* 42
3. A recognizance which does not require appellant to abide the judgment of the district court and not depart therefrom without leave is invalid and confers no jurisdiction on the district court. *Oppfelt v. State* 549

Banks and Banking.

1. An action to impress a trust on assets of an insolvent national bank is governed by federal law. *Central Nat. Bank v. First Nat. Bank* 161
2. A *cestui que trust* who seeks a preference to assets of an insolvent national bank must clearly prove that the trust property or its proceeds went into a specific fund or property which came into the receiver's hands. *Central Nat. Bank v. First Nat. Bank* 161
3. Tracing trust property to general assets of an insolvent estate and showing that it increased their value will not sustain a claim to preference. *Central Nat. Bank v. First Nat. Bank* 161
4. A bank receiving notes for collection and remittance holds the proceeds as trustee entitling remittor to a prior lien upon failure of the collecting bank, provided he can trace the proceeds into the possession of the receiver, and into existing assets. *State, ex rel. Spillman, v. Citizens State Bank* 358
5. State, county and municipal taxes are a first lien on the assets of an insolvent state bank in the hands of a receiver, and claim therefor need not be filed as ordinary claims of creditors. *State, ex rel. Spillman, v. Ord State Bank* 189
6. It is the duty of the receiver of a state bank to pay all valid taxes on the bank's assets before any payment to depositors. *State, ex rel. Spillman, v. Ord State Bank* 189
7. Where assets of an insolvent state bank were sufficient to

pay taxes, but had been paid to depositors, or sold in liquidation, taxes may be ordered paid out of the depositors' guaranty fund. *State, ex rel. Spillman, v. Ord State Bank* 189
8. In an action to recover a bank deposit, evidence *held* insufficient. *State, ex rel. Spillman, v. Valentine State Bank* 280
9. A renewal of certificate of deposit *held* a "deposit" and not a loan. *State, ex rel. Spillman, v. Citizens State Bank* 358
10. A certificate of deposit representing money obtained by a stockholder of a failed bank to effect a loan to the bank will not be allowed as a claim against the guaranty fund. *State, ex rel. Spillman, v. Citizens State Bank* 358
11. Certificate of deposit for funds collected for an officer of a bank will be allowed as a claim against the guaranty fund. *State, ex rel. Spillman, v. Citizens State Bank* 358
12. The relation of banker and depositor can only be created by contract. *State, ex rel. Spillman, v. Citizens State Bank* 358
13. Trust funds will not be changed into a deposit by implication, and thus be made a charge on the guaranty fund. *State, ex rel. Spillman, v. Citizens State Bank* 358
14. A draft on a bank in which the drawer had sufficient funds *held* within the protection of the guaranty fund. *State, ex rel. Spillman, v. First State Bank* 370
15. In determining the liability of the guaranty fund, the transaction will be considered as it appeared to the parties at the time. *State, ex rel. Spillman, v. First State Bank* 370
16. That a transaction resulted in a loss to the bank will not relieve the guaranty fund. *State, ex rel. Spillman, v. First State Bank* 370
17. Intended fraud of bank officer *held* not to deprive holder of draft of protection of guaranty fund. *State, ex rel. Spillman, v. First State Bank* 370
18. A judgment creditor seeking to levy on assets of a bank in the hands of the guaranty fund commission must allege and prove that the commission has had more than a reasonable time to determine the status of the bank. *McBride v. Taylor* 381
19. The guaranty fund commission has a reasonable time to determine whether a bank in its charge will be turned back or closed, during which time its assets are immune from execution. *McBride v. Taylor* 381
20. "Reasonable time" for the guaranty fund commission to

determine whether a bank shall be closed, ordinarily, is a question of fact. *McBride v. Taylor* 381
21. Where a bank ratifies the purchase of notes by the cashier from himself for the bank, it is chargeable with his knowledge of defects in the notes. *Brownell v. Ruwe* 407
22. The taking over of a bank by the department of trade and commerce does not effect a dissolution of the corporation. *Svoboda v. Snyder State Bank* 431
23. A bank taken over by the department of trade and commerce is subject to suit on its contracts unless interfering with the possession or distribution of assets. *Svoboda v. Snyder State Bank* 431
24. An action against a bank taken over by the department of trade and commerce is not a suit against the state requiring its consent thereto. *Svoboda v. Snyder State Bank* 431
25. Where a stockholder of an insolvent bank procured money to enable it to meet a pressing obligation, *held* that the transaction did not constitute a *bona fide* deposit. *State, ex rel. Spillman, v. Farmers State Bank of Wolbach* 448
26. What constitutes a deposit under the guaranty law, stated. *State, ex rel. Spillman, v. Farmers State Bank of Wolbach* 448
27. A state bank is liable to a county treasurer for the amount of county funds deposited therein; and, if not transgressing the guaranty law, on failure of the bank, he is entitled to a preferred claim against the guaranty fund. *Cleary v. Fidelity & Deposit Co* 478
28. The depositors' guaranty fund is solely a creature of statute, and can be augmented, replenished, reimbursed or disbursed only as provided by statute. *Cleary v. Fidelity & Deposit Co* 478
29. Subrogation to augment or replenish the depositors' guaranty fund is limited to assets of the bank. *Cleary v. Fidelity & Deposit Co* 478
30. Where a county treasurer deposits public funds in a state bank in excess of 50 per cent. of its paid-up capital stock, the entire deposit is within the protection of the guaranty law. *Cleary v. Fidelity & Deposit Co* 478
31. Adjudication of a county treasurer's claim against the guaranty fund, not appealed from, becomes *res judicata*. *Cleary v. Fidelity & Deposit Co* 478
32. The liability on the official bond of a county treasurer depositing public funds in a state bank in excess of 50 per cent. of its capital stock is secondary to that of the

depositors' guaranty fund. *Cleary v. Fidelity & Deposit Co.* 478
33. When the superintendent of banks of South Dakota takes over a state bank, he acts as trustee for the bank, its creditors and stockholders. *First State Bank of Herrick v. Conant.* 562
34. A state bank taken over by the superintendent of banks of South Dakota continues as a legal entity until finally liquidated. *First State Bank of Herrick v. Conant*..... 562
35. The superintendent of banks of South Dakota, on taking over a state bank, may sue and collect obligations due the bank in the name of the bank. *First State Bank of Herrick v. Conant*..... 562
36. In an action by the superintendent of banks of South Dakota on a note due a bank taken over by him, the bank is the "real party in interest." *First State Bank of Herrick v. Conant*..... 562
37. The constitutional provision imposing double liability on bank stockholders and the provision requiring exhaustion of corporate property before enforcement of such liability must be considered together. *Rogers v. Selleck*..... 569
38. The constitutional provision imposing double liability on bank stockholders becomes part of stock subscription contracts, but cannot be enforced until ascertainment of exact amount due and exhaustion of corporate property. *Rogers v. Selleck*..... 569
39. The double liability of bank stockholders inures to the benefit of unpaid creditors, and not to the bank. *Rogers v. Selleck* 569
40. A suit to enforce double liability on bank stockholders must be prosecuted by one creditor for the benefit of all or by the receiver. *Rogers v. Selleck*..... 569
41. The remedy to enforce double liability on bank stockholders is a suit in equity by one creditor for the benefit of all, or by the receiver, against all the stockholders. *Rogers v. Selleck*..... 569
Brownell v. Anderson..... 652
42. Equity will take jurisdiction of a suit to enforce double liability of bank stockholders, to prevent a multiplicity of suits. *Rogers v. Selleck*..... 569
43. Filing a claim by a receiver of a bank with the county court for double stock liability against the estate of a deceased stockholder, *held* not to vest the county court with exclusive jurisdiction; nor to deprive the receiver of the right to sue in the district court; that the executor was a proper party defendant and that it was the duty

of the county court to direct the executor to retain sufficient assets to pay the claim. *Brownell v. Anderson*..... 652
44. Attorneys making collections for a bank *held* not entitled to a preferred lien on the assets. *State, ex rel. Spillman, v. Citizens State Bank*..... 860

Bastardy.
"Unmarried" in the bastardy statute relates to the mother of an illegitimate child at the time it was begotten and born, and not at the time of making complaint. *Engstrom v. Engstrom*..... 167

Bills and Notes.
1. Making and accepting a renewal note is not payment of the original indebtedness, unless by specific agreement. *Willis v. Sponsler*..... 1
2. An accommodation maker of a note is not liable to the party accommodated. *Willis v. Sponsler*..... 1
3. Where one signs a note on condition that others sign, delivery thereof without such signatures, with notice of the condition, is invalid. *Farmers State Bank v. Baker*..... 29
4. Unconditional release of one joint maker of a note, without the consent of the others, is a release of all. *Farmers State Bank v. Baker*..... 29
5. A purchaser after maturity is not an innocent purchaser, and cannot enforce a note against a married woman, surety for her husband, if the payee could not do so. *First Nat. Bank v. Ernst*..... 34
6. Extension of time of payment is a valid consideration for the signing of a renewal note. *First State Bank of Herrick v. Conant*..... 562

Bonds. SEE BAIL.
1. An appeal bond, conditioned for appearance on the first day of the next term instead of forthwith, *held* sufficient. *Abbott v. State*..... 350
2. "Forthwith," in the statute relating to the appearance of defendant on appeal, means the first opportunity after appeal is perfected. *Abbott v. State*..... 350
3. Where the conditions of a statutory bond are separable, the conditions prohibited or not authorized may be rejected, and the residue sustained, where the statute does not expressly, or by necessary implication, declare the bond void as a whole. *American Surety Co. v. School District*..... 6

Carriers.

1. A street car passenger, seeking recovery for injury caused by the lurching of the car, must show that it was of such an unusual character as to warrant an inference of negligence. *McCann v. Omaha & C. B. Street R. Co*..... 786
2. In an action for injuries to passenger on street car, conclusion of witness as to violent manner of stopping the car *held* admissible. *McCann v. Omaha & C. B. Street R. Co*..... 786

Chattel Mortgages.

1. A chattel mortgage describing cows and their "increase," made during period of gestation, created a lien on the calves while being nurtured for a reasonable period. *Peterson v. Citizens Bank*..... 327
2. A chattel mortgage on cows and their "increase" does not create a lien on calves in existence at time mortgage was made. *Peterson v. Citizens Bank*..... 327
3. Calves running with their mothers are "cattle" within a chattel mortgage including all cattle, branded and unbranded. *Peterson v. Citizens Bank*..... 327

Constitutional Law. SEE ANIMALS. STATUTES, 6. TAXATION, 4.

1. Ch. 110, Laws 1923, relating to recovery on forfeited recognizances and repealing certain statutes, *held* void for indefiniteness and uncertainty, and to violate the constitutional provision concerning amending statutes. *State v. Painter*..... 42
2. Sec. 2, ch. 110, Laws 1923, being an inducement to the passage of the act, the act is void in its entirety. *State v. Painter*..... 42
3. The freedom of the press does not extend to contemptuous interference with pending litigation, *State v. Lovell* 710
4. The freedom of the press will not protect one from contemptuous publications pending litigation. *State v. Lovell* 710
5. It is the duty of a court to protect its purity, impartiality, and independence, and the rights of litigants from extraneous and lawless influences. *State v. Lovell*..... 710

Contempt.

1. Editorial on case pending *held* contemptuous *per se*. *State v. Lovell*..... 710
2. Editorial commenting on the court in a pending case for the purpose of influencing the decision may be sufficient

to refute oral evidence of innocence of contempt. *State v. Lovell* 710
3. Defendant in a prosecution for constructive contempt of court in commenting on pending litigation may testify to his intent, but the issue of guilt is a question of fact. *State v. Lovell* 710

Contracts.

1. Where two clauses of a written instrument are repugnant, the first will be retained and the second rejected, unless the inconsistency voids the instrument for uncertainty. *American Surety Co. v. School District* 6
2. When an instrument consists partly of written or typewritten and partly of printed form, the former controls where the two are inconsistent. *American Surety Co. v. School District* 6
3. Statutes, with reference to which contracts are made, become a part thereof. *American Surety Co. v. School District* 6
4. Deposit of a signed contract in the post office, properly stamped and addressed, completes a contract sent from another state to be signed and returned. *First Nat. Bank v. Ernst* 34
5. Attorney's contract for compensation *held* unambiguous. *Martin v. Reavis* 219
6. Construction of unambiguous written contract is for the court. *Martin v. Reavis* 219

Corporations.

1. It is no defense to a suit to enjoin wrongful and fraudulent use of a trade-name that plaintiff is a foreign corporation doing business without compliance with the Nebraska statutes. *Northwest Ready Roofing Co. v. Antes* 121
2. The state only can complain of failure of a foreign corporation to comply with statutory requirements for doing business, and prescribed penalties are exclusive in so far as third persons are concerned. *Northwest Ready Roofing Co. v. Antes* 121
3. The lien of a holder of corporate stock as collateral is superior to the lien of the corporation under an unposted by-law. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388
4. Notice that corporate stock was held as collateral *held* timely. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388

5. Constructive notice of corporate by-laws is imputed to third parties only if a copy thereof is posted conspicuously in the corporation's place of business. *Department of Trade & Commerce v. Bankers Automobile Ins. Co*..... 388
6. Equity will deny relief as to consummated purely *ultra vires* acts of a corporation when to grant it will occasion public inconvenience and the defendant serious loss. *Folts v. Globe Life Ins. Co*..... 723
7. Courts in determining whether equitable relief will be granted will consider whether the act challenged is merely *ultra vires*, or wholly void. *Folts v. Globe Life Ins. Co*..... 723

Counties and County Officers.

1. The county board has power to lease realty owned by the county. *Lindburg v. Bennett*..... 66
2. In absence of fraud, county board will not be enjoined from leasing for 99 years realty of the county not actually used nor needed for actual uses, where the consideration is adequate and the lease protects the county's interests. *Lindburg v. Bennett*..... 66
3. A 99-year lease of realty of a county *held* not equivalent to a "sale." *Lindburg v. Bennett*..... 66
4. The option of a lessee to purchase county realty in case of a contemplated sale *held* not operative to void a subsequent lease, no sale being involved. *Lindburg v. Bennett*..... 66
5. Taxpayers may appeal from an order of the county board allowing a claim against the county, though its allowance was the result of a compromise of a disputed claim. *Campbell Co. v. Boyd County*..... 186
6. On appeal from an order of the county board allowing a claim against a county, the district court tries the case *de novo*. *Campbell Co. v. Boyd County*..... 186

Courts.

Decisions of the supreme court commission establish no precedent and are authority only in the particular case. *Burkamp v. Roberts Sanitary Dairy*..... 60

Criminal Law. SEE BAIL. BASTARDY. BONDS. CONTEMPT. EMBEZZLEMENT. FALSE IMPRISONMENT. HOMICIDE. INCEST. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. RAPE.

1. A petition, as ground for issuance of writ *coram nobis*,

stating only a fact known to applicant before judgment, is insufficient. *State v. Boyd* 320
2. A writ *coram nobis* does not lie to bring into the record facts known to the applicant before judgment. *State v. Boyd* 320
3. A defendant appealing to the district court, who is not brought to trial before the end of the third term, is entitled to discharge. *Abbott v. State* 350
4. Weight of evidence in incest is for the jury, and verdict supported by sufficient evidence will stand. *Purvis v. State* 377
5. Error as to any matter of pleading or procedure in a criminal action violating constitutional rights of the accused will not be disregarded. *Stowe v. State* 440
6. Articles will not be excluded as evidence because obtained in an irregular or illegal manner. *Kuxhaus v. State* 514
7. One who has had experience with mash is competent to testify that a certain mixture is in a state of fermentation and is mash. *Kuxhaus v. State* 514
8. Rule as to consideration of evidence given by informers or detectives *held* inapplicable to county attorneys, sheriffs, or deputies. *Flanagan v. State* 531
9. An order overruling a motion for an involuntary nonsuit is not erroneous where competent evidence is sufficient to sustain a conviction. *Gorton v. State* 556
10. A plea of not guilty waives matters which might have been raised by motion to quash or plea in abatement and must be withdrawn before defendant can urge such matters; but, where there is no complaint, such plea need not be withdrawn before interposing a challenge to the right of the court to proceed. *Lindley v. State* 597
11. It is error to try a misdemeanor case on appeal without a complaint. *Lindley v. State* 597
12. Exclusion of a declaration of doubtful meaning as part of the *res gestæ*, *held* not error. *Denison v. State* 601
13. Remarks of the court relating to necessity for an interpreter *held* not error. *Denison v. State* 601
14. Jurisdiction to pronounce a particular sentence imposed is essential to a valid sentence. *Wilson v. State* 692
15. A sentence void for want of jurisdiction may be first questioned on appeal. *Wilson v. State* 692
16. Instruction as to elements of murder in the first degree *held* not error, in view of other instructions. *Sharp v. State* 304
17. Where instructions as a whole make "felonious intent"

essential to a conviction for embezzlement, a single instruction is not necessarily prejudicial because of use of the words "fraudulently converted." *Gorton v. State*..... 556
18. Instruction in a trial for embezzlement *held* erroneous as eliminating presumption of innocence. *Griess v. State*.... 719

Damages.

1. An instruction that pain and suffering which plaintiff will "probably" suffer in the future may be considered in fixing damages, *held* erroneous. *Burkamp v. Roberts Sanitary Dairy* 60
2. An instruction that the jury in a personal injury suit might consider the need of assistance on the part of persons benefited by a favorable verdict, *held* erroneous. *Emel v. Standard Oil Co*..... 418

Death.

1. Civil remedy by action against one causing death is a creature of statute. *Luckey v. Union P. R. Co*..... 85
2. The civil liability of a third person for negligently causing death is not changed by the workmen's compensation law. *Luckey v. Union P. R. Co*..... 85
3. An action for death must be brought in the name of the administrator of decedent's estate. *Luckey v. Union P. R. Co.* 85
4. The workmen's compensation law does not create a cause of action for negligently causing death, nor authorize a suit by the widow, dependents, administrator, or employer. *Luckey v. Union P. R. Co*..... 85
5. In an action for death, evidence *held* sufficient to raise question for jury and to sustain verdict for plaintiff. *Luckey v. Union P. R. Co*..... 85

Deeds.

1. Courts in construing instruments conveying real estate must give effect to the true intent of the parties so far as consistent with law. *Heiser v. Brehm*..... 472
2. An unwitnessed deed is valid between the parties and others except creditors and subsequent purchasers or mortgagees in good faith. *Mulligan v. Snavely*..... 765

Descent and Distribution.

1. Every deceased person is presumed to have left surviving some kindred, and the burden is on the state to prove failure of kindred or surviving spouse, entitling it to decedent's property by escheat. *In re Estate of O'Connor* 636

2. There is no presumption that any particular person is heir of a decedent. *In re Estate of O'Connor* 636
3. Where two or more groups of persons claim to be heirs of a decedent, each group has the burden of establishing its claim by a preponderance of the evidence. *In re Estate of O'Connor* 636
4. Evidence of general resemblance is not admissible to prove consanguineous relationship; but specific traits and particular or peculiarly marked physical characteristics are admissible for such purpose. *In re Estate of O'Connor* 636

Divorce.

Evidence *held* to sustain decree of divorce to wife. *Taminosian v. Taminosian* 285

Drains.

Construction of a drainage ditch pursuant to proceedings of county supervisors conducted secretly will be enjoined. *Johnson v. Platte County* 453

Easements.

Adverse user for ten years may create an easement to use a vacant strip of an adjoining lot for painting, washing windows, and making necessary repairs. *Dunbar v. O'Brien* 245

Elections.

1. The secretary of state, on objections to a certificate of nomination for a new political party, may determine from extrinsic evidence whether a lawful convention was held. *State, ex rel. Stephens, v. Marsh* 579
2. A certificate of nomination of a new political party cannot be filed, unless accompanied by a petition signed by at least 500 electors. *State, ex rel. Stephens, v. Marsh* 579

Embezzlement.

1. Evidence of a continuous series of conversions may support a conviction for an aggregate sum as a single embezzlement. *Gorton v. State* 556
2. Checks by which accused procured money charged to have been embezzled *held* admissible in evidence, though a bill of particulars gave the date of each check as the date of conversion instead of the date on which the money was received. *Gorton v. State* 556

3. Checks may be admissible in evidence in connection with proof that accused used them to procure money he was charged with embezzling. *Gorton v. State* 556

Eminent Domain.

1. The value of property taken for public use or damage thereto must be ascertained and provision made for payment before taking. *Meyer v. City of Alma* 511
2. The owner of the fee cannot enjoin use of right of way by licensee of railroad without showing special or irreparable damage. *Hall v. Bowers* 619

Equity. SEE BANKS AND BANKING, 41, 42.

1. Courts will use technicalities as instruments to prevent injustice, but not to defeat justice. *Northwest Ready Roofing Co. v. Antes* 121
2. The equity doctrine that a party with unclean hands will be denied relief does not apply unless his wrongdoing has proximate relation to the subject-matter in question. *Northwest Ready Roofing Co. v. Antes* 121
3. Equity will take jurisdiction when unnecessary trials, repeated appeals, delays, and wasteful costs will thereby be avoided. *Rogers v. Selleck* 569

Escheat.

Where there is reason to believe that decedent died without heirs, the state may intervene and assert its right to the property. *In re Estate of O'Connor* 636

Escrows.

An escrow should be made by all parties to the instrument deposited. *Willis v. Sponsler* 1

Estoppel.

1. To constitute an equitable estoppel by silence or acquiescence, it must be shown that the facts were known to the parties against whom the estoppel is urged. *Cech v. Costello* 224
2. Where one of two innocent persons must suffer loss, the one at fault should bear it. *Nebraska State Bank v. May* 262
3. Where facts showing estoppel are admitted, estoppel need not be specially pleaded. *Yates v. New England Mutual Life Ins. Co* 265

Evidence.

1. In an action on a note, parol evidence, generally, is admissible to prove that defendants were accommodation makers, where that defense is an issue. *Willis v. Sponsler* 1
2. The rule excluding parol evidence to vary or contradict a written instrument applies only between parties to such instrument and those claiming under them. *American Surety Co. v. School District* 6
3. Where intent is a direct issue, a married woman may testify as to her lack of intent to bind her separate estate by a note, the weight of such testimony being for the jury. *First Nat. Bank v. Ernst* 34
4. In absence of pleading and proof, statutes of a sister state are presumed to be the same as those of Nebraska. *First State Bank of Herrick v. Conant* 562
5. Testimony as to proper method of stopping a street car *held* admissible. *McCann v. Omaha & C. B. Street R. Co.* 786

Executors and Administrators. SEE BANKS AND BANKING, 43.

1. No authority exists to appoint an administrator in Nebraska, where deceased was a resident of and died in a foreign country, leaving no estate to be administered in Nebraska; but an administrator may be appointed to prosecute a transitory right of action to recover money in the hands of the alien property custodian on behalf of the estate of a decedent. *In re Estate of Buder* 52
2. Funds of a nonresident decedent in custody of the alien property custodian have their situs in any state as regards appointment of an administrator. *In re Estate of Buder* 52
3. The county court may determine the persons entitled to and distribute funds collected from the alien property custodian. *In re Estate of Buder* 52
4. An administrator's lease for a period after the estate is settled is not void and may be ratified by the lessee and the heirs. *Muller v. Harms* 657

Exemptions.

Only residents of state and heads of families are entitled to exemption from attachment; a physician, not the head of a family, is not exempt. *Howells State Bank v. Arps* 110

False Imprisonment.

1. Malice is not a material element in an action for false imprisonment. *Hall v. Rice* 813

2. An instruction in an action for false imprisonment that malice is immaterial except as it affects damages is erroneous, as punitive and exemplary damages are not allowed in absence of statute. *Hall v. Rice* 813

Fraudulent Conveyances.

1. One purchasing a stock of merchandise in bulk, without complying with the statute, becomes a trustee for creditors and liable as garnishee. *Cech v. Costello* 224
2. Ordinarily, in absence of estoppel, a creditor may assert rights under the bulk sales law against a purchaser of merchandise at any time within the general statute of limitations. *Cech v. Costello* 224
3. Evidence *held* insufficient to show existence of valid debts as consideration for conveyance. *Colfax County Bank v. Konvalin* 276

Habeas Corpus.

1. Habeas corpus will not lie to discharge one serving a penal sentence, if the court imposing it had jurisdiction of the offense and the person, and power to impose sentence. *In re Carbino* 107
2. Habeas corpus cannot be used as a substitute for proceedings in error. *In re Carbino* 107

Highways.

1. Improvement of highway will not be enjoined at the instance of one who has seen the work progress, and who has an adequate remedy at law. *Meyer v. City of Alma* .. 511
2. The county surveyor, in viewing and reporting on the expendiency of establishing a road pursuant to resolution of the county board, must form an independent judgment and exercise a judicial function. *Shirley v. Harlan County* 846
3. A county surveyor, voting as a member of the county board for a resolution establishing a highway, disqualified himself from acting as a commissioner to determine the expediency of establishing the road. *Shirley v. Harlan County* 846
4. Where a county surveyor was incompetent to act as a commissioner to determine the expediency of establishing a highway, his attempt so to do was invalid. *Shirley v. Harlan County* 846
5. A county board cannot establish a public road without an examination and report on its expediency, unless written consent of all landowners affected is filed with the county clerk. *Shirley v. Harlan County* 846

Homestead.

1. A suit to foreclose a mortgage on a homestead may be defended on the ground that the note and mortgage were signed by mortgagors as an accommodation to mortgagee and were never unconditionally delivered. *Willis v. Sponsler* 1
2. The statutory homestead, as between mortgagors and mortgagee of an invalid mortgage, is unlimited as to value. *Storz v. Clarke* 488
3. Conveyance of homestead must be executed and acknowledged by both husband and wife. *Storz v. Clarke* 488
4. Instrument *held* void as to homestead. *Storz v. Clarke* 488

Homicide.

1. Evidence *held* to sustain conviction for murder in the first degree. *Sharp v. State* 304
2. Motive is not an essential element of murder, though absence thereof is a circumstance in favor of accused. *Sharp v. State* 304
3. Murder in the second degree and manslaughter are included in a charge of murder in the first degree, and where different inferences may be drawn from the evidence as to the degree, the court should submit the different degrees to the jury. *Denison v. State* 601
4. On plea of guilty to charge of first degree murder, fixing the penalty is vested exclusively in the jury. *Wilson v. State* 692
5. To justify a verdict of murder in the first degree, it must be alleged and proved that the killing was done *purposely*, and with *deliberate and premeditated malice*. *Pembrook v. State* 759
6. The words "purposely," "deliberate," "premeditated," and "malice," defined. *Pembrook v. State* 759
7. Instruction defining "purposely," "deliberate," "premeditated," and "malice," *held* erroneous. *Pembrook v. State* 759

Husband and Wife.

1. A renewal note executed by a married woman as surety without consideration is subject to the same defenses as the original note. *First Nat. Bank v. Ernst* 34
2. A note executed by a married woman as surety for her husband is not binding on her, unless it is shown that she intended to bind her separate estate. *First Nat. Bank v. Ernst* 34

3. The burden is on one suing a married woman as surety to prove that she intended to bind her separate estate. *First Nat. Bank v. Ernst* 34
4. Intent of a married woman to bind her separate estate as surety *held* necessary. *First Nat. Bank v. Ernst* 34
5. Refusal to permit a married woman to show by oral testimony that, at the time she executed a note as surety, it was agreed that her separate estate would not be liable, *held* error. *First Nat. Bank v. Ernst* 34
6. The common-law disability of a married woman to contract is in force except as abrogated by statute. *McRoberts v. Dworak* 342
7. Where coverture is pleaded as a defense to a suit on a note, plaintiff has the burden of establishing that the note was made with reference to and on the credit of her separate estate and with intent to bind same. *McRoberts v. Dworak* 342

Incest.

Information for incest *held* sufficient. *Purvis v. State* 377

Indictment and Information.

1. A person accused of a felony must be charged by an information or indictment which discloses the nature and cause of accusation. *Stowe v. State* 440
2. Failure to state the exact date of embezzlement in an information is not a fatal defect. *Gorton v. State* 556
3. Information *held* sufficient to charge murder in the first degree by administering poison. *Wilson v. State* 692

Insurance.

1. Statute prescribing the classes of insurance which companies may be formed to transact, *held* to act prospectively, and not to limit the classes of insurance which a previously existing company was authorized to write. *State, ex rel. Spillman, v. Federated Merchants Mutual Ins. Co.* 98
2. Life policies will be construed most strongly against insurer. *Yates v. New England Mutual Life Ins. Co* 265
3. Incontestable clause in a life policy as to time for contest upheld. *Yates v. New England Mutual Life Ins. Co* 265
4. An incontestable clause in a policy applies before and after death of insured. *Yates v. New England Mutual Life Ins. Co* 265
5. An incontestable clause in a policy need not be specially

pleaded when attached to, and made a part of, the petition. *Yates v. New England Mutual Life Ins. Co* 265
6. Insurer *held* estopped to make defense of suicide. *Yates v. New England Mutual Life Ins. Co* 265
7. Whether a policy had lapsed *held* question for the jury. *Yates v. New England Mutual Life Ins. Co* 265
8. Whether insured died while the policy was in force *held* question for jury. *Yates v. New England Mutual Life Ins. Co* 265
9. Where an insurance company refuses to pay a loss on the ground that the policy had lapsed, it cannot assert different defenses after litigation is begun. *Yates v. New England Mutual Life Ins. Co* 265
10. Waiver of terms of a hail insurance policy is an affirmative defense, and must be pleaded. *Summers v. Automobile Ins. Co* 318
11. In an action against an insurance company for loss of crop, where there was no evidence of value of the crop, direction of verdict for defendant *held* proper. *Summers v. Automobile Ins. Co* 318
12. Where the petition alleged payment of insurance premiums and the answer admitted issuance of policy, *held* that payment of premiums was not put in issue. *Stratton v. Service Life Ins. Co* 685
13. Facts showing breach of condition as defense must be specially pleaded. *Stratton v. Service Life Ins. Co* 685
14. An incontestable clause, except as to certain matters, excludes all defenses not within the exception. *Stratton v. Service Life Ins. Co* 685
15. Limitation of one year to contest a policy for fraud *held* reasonable. *Stratton v. Service Life Ins. Co* 685
16. Limitation in policy less than the statutory provision to contest a policy for fraud *held* valid. *Stratton v. Service Life Ins. Co* 685
17. Approval of unlawful act by the department of trade and commerce will afford no protection to wrongdoers. *Folts v. Globe Life Ins. Co* 723
18. Plaintiffs *held* not estopped, nor precluded by laches, to maintain suit to enjoin unlawful use of funds by a fraternal insurance association. *Folts v. Globe Life Ins. Co.* 723
19. A member of a fraternal benefit corporation may sue the corporation and its officers for himself and others to recover corporate funds wrongfully misappropriated. *Folts v. Globe Life Ins. Co* 723
20. A provision voiding certificate of membership in a fra-

ternal association, in case the member sues the association without first submitting his grievances to the proper tribunals, is not applicable to a nonappealable act by the supreme governing body. *Folts v. Globe Life Ins. Co.*.... 723

21. A fraternal benefit corporation cannot write insurance for profit; nor can it incorporate an old line insurance corporation and subscribe for its capital stock under the guise of having it cooperate with the fraternal company. *Folts v. Globe Life Ins. Co*.... 723
22. A fraternal benefit corporation cannot use its surplus in organizing a business corporation under pretext of an investment. *Folts v. Globe Life Ins. Co*.... 723
23. Organization of a stock insurance corporation with funds of a fraternal benefit association *held ultra vires*, against public policy, and void. *Folts v. Globe Life Ins. Co*.... 723
24. Fraternal benefit insurance organizations are restricted in their activities to the objects and purposes of their existence. *Folts v. Globe Life Ins. Co*.... 723
25. Fraternal societies in matters of business, property rights and contracts are answerable to the laws governing their organization. *Folts v. Globe Life Ins. Co*.... 723
26. Organization of a stock company by a fraternal insurance corporation, and subscribing for the entire capital stock, *held* not a consolidation. *Folts v. Globe Life Ins. Co.* 723

Intoxicating Liquors.

1. "Mash" defined. *Kuxhaus v. State*.... 514
2. Evidence *held* to sustain finding that defendant had in his possession mash and necessary equipment for manufacturing liquor. *Kuxhaus v. State*.... 514
3. The offense of possession of mash and equipment for making liquor requires only possession of mash being used in the process of manufacturing liquor. *Kuxhaus v. State* 514

Judgment.

1. A transcript of a judgment filed in another county is not a lien on the debtor's property until entered on the judgment record. *Rathbone Co. v. Kimball*.... 229
2. Statutes governing liens of judgments in state and federal courts *held* to be in conformity. *Rathbone Co. v. Kimball* 229
3. Judgments of federal courts in Nebraska are liens on the debtor's property only in the county where rendered un-

less a transcript is filed and entered of record in other counties. *Rathbone Co. v. Kimball* 229
4. The statute authorizing the district court to vacate or modify a judgment after the term does not apply to a judgment by the supreme court. *Brandeen v. Beale* 291

Jury.

1. A juror having conscientious scruples against returning a verdict for murder, punishable by death, may be excused for cause. *Sharp v. State* 304
2. A juror having formed an opinion *held* not thereby disqualified, in view of his statement that he would disregard the opinion and return a fair and impartial verdict. *Sharp v. State* 304
3. Overruling of challenges to jurors on their *voir dire* approved. *Noonan v. State* 520
4. A jury summoned by a sheriff who testified at the trial is not vulnerable to challenge. *Noonan v. State* 520
5. Parties to proceedings to establish heirship, where questions of fact only are involved, are entitled to a jury trial. *In re Estate of O'Connor* 636

Larceny.

Instruction on evidential effect of proof of unexplained possession of property recently stolen *held* not erroneous. *Flanagan v. State* 531

Libel and Slander.

1. A communication by the manager of a store to the other clerks that one had confessed to embezzlement, *held* qualifiedly privileged. *Hall v. Rice* 813
2. Plaintiff in an action for slander has the burden of proving that slanderous words uttered under circumstances of qualified privilege were uttered with express malice. *Hall v. Rice* 813
3. In an action for slander, proof of slanderous words libelous *per se* raises a presumption of malice, requiring evidence to overcome; but the burden of proving malice remains with plaintiff. *Hall v. Rice* 813
4. Instruction in an action for slander, involving a question of qualified privilege, which ignored the defense of privilege, *held* erroneous. *Hall v. Rice* 813

Licenses.

1. Domestic and foreign corporations are on an equality with reference to occupation tax. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832

2. "Paid-up capital" as applied to occupation tax on domestic corporations means the amount of authorized capital stock employed in the business. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832
3. The occupation tax of a foreign corporation is computed on the basis of the amount of its paid-up capital stock employed in this state. *State, ex rel. Case Threshing Machine Co., v. Marsh* 832

Limitations of Actions.

1. An action to reform an insurance contract for fraud or mutual mistake is barred in four years after discovery thereof. *Shanahan v. Fidelity-Phenix Ins. Co* 132
2. In an action on an insurance policy, an amended petition seeking reformation of the policy declares on a new cause of action, and is barred, unless filed within four years from accrual thereof. *Shanahan v. Fidelity-Phenix Ins. Co.* 132
3. Petition to vacate a judgment for fraud after two years *held* properly stricken. *Brandeen v. Beale* 291
4. Amendment to petition in action for death *held* to introduce a new cause of action, barred by the statute of limitations. *Emel v. Standard Oil Co* 418

Master and Servant. SEE DEATH.

1. An employer, to the extent of his liability for compensation, is subrogated to the rights of the employee and his dependents against a third person who causes injury to, but not death of, the employee. *Luckey v. Union P. R. Co.* 85
2. Where an employer liable for compensation refuses to sue a third person for injury to, but not death of, the employee, the latter may sue in his own behalf. *Luckey v. Union P. R. Co* 85
3. Consent by an employer liable for compensation to an employee's action against a third person for causing injury is equivalent to refusal to sue the wrongdoer. *Luckey v. Union P. R. Co* 85
4. Evidence *held* to establish compensable status of county employee, and that the award and attorney's fee were not excessive. *Davis v. Lincoln County* 148
5. Evidence *held* to sustain finding that deceased was manager of an insurance agency, an independent contractor, not within the workmen's compensation act. *Priest v. Business Men's Protective Ass'n* 198
6. Recovery *held* not barred, where an employee made claim

of his employer for compensation within two months after injury and lodged claim with the commissioner within seven months thereof. *Palmer v. Saunders County* 484

7. An action for compensation by an injured employee, pending at time of his death, may be revived on motion by his dependents on giving bond or by the administrator without bond; the pleadings must state facts sufficient to bring the application within the statute. *Palmer v. Saunders County* 484

8. Appeal from compensation award pending in one county *held* not to deprive the district court for another county of jurisdiction of another appeal from the same award. *Ashton v. Blue River Power Co* 661

9. Where compensation was paid without adjudication or agreement of settlement the statutory limitation *held* not to take effect until one year after the last payment. *Ashton v. Blue River Power Co* 661

10. A minor employee between 14 and 16 years of age may maintain an action at common law for damages against the employer who has no employment certificate. *Benner v. Evans Laundry Co* 701

11. A minor employee between 14 and 16 years of age, not classified, may sue at common law for an injury. *Benner v. Evans Laundry Co* 701

12. Evidence of employer's failure to procure an employment certificate is material only to sustain the right to bring an action at common law for injury. *Benner v. Evans Laundry Co.* 701

13. Original contractor *held* "third party" and liable to employee of subcontractor injured by reason of negligence of original contractor; and that the subcontractor is the only employer of the injured party, all others being "third parties." *Boyd v. Humphreys* 799

14. "Employer", as used in sec. 3039, Comp. St. 1922, does not include an owner who requires his contractor to take out compensation insurance, nor a contractor who requires his subcontractor to take out such insurance. *Matthews v. Crancer Co* 805

15. An owner as to employees of his contractor, and a contractor as to employees of his subcontractor are "third persons." *Matthews v. Crancer Co* 805

16. An owner is liable at common law for damages sustained by his contractor's employees caused by his actionable negligence, and a contractor is likewise liable to employees of his subcontractor. *Matthews v. Crancer Co* 805

17. Surrender of right to prosecute an action at common law for damages arising from actionable negligence of another *held* to apply solely to contractor and injured employee. *Sloan v. Harrington* 809
18. "Third person" as used in sec. 3041, Comp. St. 1922, *held* to signify persons other than contractor and its injured employee. *Sloan v. Harrington* 809

Mortgages.

1. Parties to a mortgage foreclosure suit, wherein irrigation district assessments were given priority over a mortgage, could not challenge the district's right to levy assessments after stipulating that organization of the district was legal and the levy and assessment were duly made. *Flansburg v. Shumway* 125
2. Statutory provisions in force at time of execution of a mortgage enter into and become part of the contract. *Flansburg v. Shumway* 125
3. Allowing bidder to increase his bid on hearing for conformation of sale *held* not error, where owner of property was not injured. *Gordon State Bank v. Hinchley* 211
4. Where the holder of a secured note sold it without disclosing that he was acting as agent, he is liable for deficiency in subsequent foreclosure proceedings. *Thornton v. Farmers & Merchants Nat. Bank* 355
5. One charged with notice of a record may rely on the validity of all instruments not disclosing facts impeaching it or putting him on inquiry. *Mulligan v. Snavely* 765
6. Actual notice of an instrument affecting title to real estate is as binding as constructive notice by record. *Mulligan v. Snavely* 765
7. One who by himself or agent examines a record is charged with actual notice of matters properly of record and of instruments not entitled to record appearing thereon. *Mulligan v. Snavely* 765
8. A subsequent purchaser or mortgagee may rely on an abstract only to the extent that it correctly reflects the record. *Mulligan v. Snavely* 765
9. A subsequent mortgagee in good faith without notice of an assignment of the debt secured by a prior mortgage may rely on a release thereof, of which he has actual or constructive notice. *Mulligan v. Snavely* 765
10. An assignment of a real estate mortgage to the indorsee of a note secured thereby is an instrument affecting title to land within the recording acts. *Mulligan v. Snavely* 765

11. A subsequent mortgagee *held* to have a superior equity to an assignee of a prior mortgage whose assignment was not of record. *Mulligan v. Snavely* 765

Municipal Corporations.

1. A *nunc pro tunc* order by resolution adopted eighteen months afterward may not change a city council record under the guise of correction. *Beverly Land Co. v. City of South Sioux City* 47
2. Paving assessments cannot be sustained on an ordinance other than that specified in the notice of meeting of a city council to determine special benefits. *Beverly Land Co. v. City of South Sioux City* 47
3. Contract with paving engineer executed by city during performance of services, *held* binding on the city. *Morearty v. City of McCook* 113
4. Paving engineer substantially performing services *held* entitled to recover from city on contract. *Morearty v. City of McCook* 113
5. In action on engineer's contract, city may recoup damages from failure to strictly perform contract. *Morearty v. City of McCook* 113
6. A city may ratify a contract irregularly made in its behalf if it had power to make such contract. *Morearty v. City of McCook* 113
7. Paving assessments in excess of benefits are unauthorized. *Munsell v. City of Hebron* 251
8. The owner of property cannot lawfully be assessed for a public improvement beyond present or reasonably prospective benefit. *Munsell v. City of Hebron* 251
9. One who attacks the validity of a paving assessment has the burden of proving its invalidity. *Munsell v. City of Hebron* 251
10. Collection of assessments for improvements will not be enjoined for technical irregularities. *Munsell v. City of Hebron* 251
11. Mere irregularities do not necessarily invalidate paving assessments. *Munsell v. City of Hebron* 251
12. Levying special assessments without a corresponding increase in value is taking private property for public use. *Munsell v. City of Hebron* 251
13. An equipped municipal aviation field is "public service property" and a "public utility" for which bonds may be voted. *State, ex rel. City of Lincoln, v. Johnson* 301
14. A state-wide primary is a "general election" within the Lincoln charter authorizing issuance of municipal bonds

on a majority vote. *State, ex rel. City of Lincoln, v. Johnson* 301
15. City charter *held* to prevail over a conflicting state statute on the same subject applicable to cities of different classes. *State, ex rel. City of Lincoln, v. Johnson*..... 301
16. Under the Lincoln charter, a majority vote is sufficient to authorize issuance of municipal bonds to establish and equip an aviation field. *State, ex rel. City of Lincoln, v. Johnson* 301
17. Charter provisions will govern, as to matters of local municipal concern, over general laws. *Salsbury v. City of Lincoln* 465
18. Improvement of city streets is solely of municipal concern. *Salsbury v. City of Lincoln*..... 465
19. Courts will not inquire as to the wisdom or necessity of legislative acts of municipal boards concerning matters within their power. *Salsbury v. City of Lincoln*..... 465

Negligence.

1. Whether violation of an ordinance or statute requiring vehicles to drive to right of center of highway constitutes negligence is a question for the jury. *Burkamp v. Roberts Sanitary Dairy*..... 60
2. Whether violation of an ordinance requiring vehicles to display lights constitutes negligence is a question for the jury. *Burkamp v. Roberts Sanitary Dairy*..... 60
3. An automobilist driving into an unbarricaded and unlighted excavation in a highway at night *held* entitled to recover. *Kelso v. Seward County*..... 136
4. It is negligence as matter of law to drive an automobile on a highway at night at a speed preventing stopping to avoid a collision with an object within the area lighted by its lamps. *Roth v. Blomquist*..... 444
5. Failure to maintain notices indicating depths of water in public bathing pool conducted for private gain may be evidence of negligence. *Lyman v. Hall*..... 140
6. Proprietors of a bathing resort in exercising ordinary care may be obliged to keep some one on duty to rescue those in danger; and may be held liable for negligence if they are tardy in instituting search for a missing bather. *Lyman v. Hall*..... 140
7. It is the duty of owners of bathing resorts to be prepared to rescue those in danger, and to promptly act, and make every reasonable effort in behalf of those known to be missing. *Lyman v. Hall*..... 140

8. The duty of a bathing resort keeper to make reasonable provision against accidents from engaging in aquatic sports for which he provides facilities may require furnishing an attendant. *Lyman v. Hall* 140
9. Ordinary care to provide a reasonably sufficient number of attendants at a bathing resort is a standard of the owner's duty. *Lyman v. Hall* 140
10. The duty to exercise ordinary care to protect patrons of a bathing resort does not make the proprietor an insurer of their safety. *Lyman v. Hall* 140
11. Plaintiff must prove that negligence pleaded was the proximate cause of the alleged injury. *Lyman v. Hall* 140
12. Instruction on comparative negligence criticized. *Emel v. Standard Oil Co* 418
13. "Wilful negligence" defined. *Ashton v. Blue River Power Co.* 661

New Trial.

1. A new trial will not be granted for newly discovered evidence which is merely cumulative. *In re Estate of O'Connor* 636
2. An excessive verdict may be corrected by remittitur. *McCann v. Omaha & C. B. Street R. Co* 786

Nuisance.

1. Lumber maliciously piled on a lot to shut out light and air from a neighbor's windows is an abatable nuisance. *Dunbar v. O'Brien* 245
2. Denial of injunction against a malicious nuisance because of abatement after suit is begun depends on good faith and attending circumstances. *Dunbar v. O'Brien* 245

Parent and Child.

1. In a controversy between a mother and strangers for custody of a child, the rights of the mother as natural guardian will be considered. *Bradley v. Beckett* 796
2. The mother *held* entitled to custody of child in preference to strangers. *Bradley v. Beckett* 796

Partition.

1. Partition will not lie in violation of restrictions imposed by the grantor in a trust deed. *Heiser v. Brehm* 472
2. Ordering partition of land under an active trust after death of trustee, over objection of some of the beneficiaries, *held* error. *Heiser v. Brehm* 472

Physicians and Surgeons.

1. A physician or surgeon who abandons his patient at a critical stage without reasonable notice, the giving of which was reasonably possible, is liable for damages. *Stohlman v. Davis* 178
2. A physician or surgeon who fails to exercise such reasonable skill and care as is ordinarily exercised by members of his profession in good standing in his or similar localities is guilty of negligence. *Stohlman v. Davis* 178
3. In a malpractice action it is not necessary, to sustain a verdict for plaintiff, that all expert witnesses should consider the treatment improper; nor will agreement of the experts that a portion of the treatment is proper under some circumstances defeat recovery. *Stohlman v. Davis* 178

Pleading.

1. A written instrument made a part of a pleading controls the allegations thereof which it contradicts or which are inconsistent therewith. *American Surety Co. v. School District* 6
2. Motion to strike petition because of insufficient facts is in effect a general demurrer, and admits truth of well-pleaded facts. *Brandeen v. Beale* 291
3. A general demurrer admits well-pleaded facts. *Salsbury v. City of Lincoln* 465
4. One whose authority to prosecute an action is limited by statute must plead facts bringing him within the limitations. *Sommerville v. Board of County Commissioners* 507

Pledges.

Where a pledgee of a mortgage forcloses, without making the pledgor a party, and purchases the property, he holds it as collateral for the principal debt unless a contrary intent appears. *Lincoln Safe Deposit Co. v. Yeast* 344

Principal and Agent.

1. Express authority for an attorney in fact to bind his principal as surety is strictly construed. *Massachusetts Bonding & Ins. Co. v. Nichols* 93
2. A principal is chargeable with knowledge acquired by an agent, when acting for another, only when proof is made that such knowledge was in the mind of the agent at the time of the transaction. *Department of Trade & Commerce v. Bankers Automobile Ins. Co* 388
3. The burden of showing that an agent had in mind knowledge gained in another transaction is on the party seek-

ing to charge the principal with the agent's knowledge. *Department of Trade & Commerce v. Bankers Automobile Ins. Co.* 388

Principal and Surety.

Act of payee *held* to release surety on note. *Nebraska State Bank v. May*..... 262

Railroads.

1. A traveler on a highway on approaching a railroad crossing who fails to look and listen for trains is guilty of negligence. *Moreland v. Chicago & N. W. R. Co*..... 456
2. A freight train standing west of a crossing *held* not to excuse a traveler on a highway from looking toward the east for an approaching train. *Moreland v. Chicago & N. W. R. Co*..... 456
3. Negligence of a traveler on a highway in failing to look for an approaching train *held* to defeat recovery for a a collision at a crossing. *Moreland v. Chicago & N. W. R. Co.* 456

Rape.

1. Sentence reduced. *Slezak v. State*..... 32
2. The unsupported testimony of the prosecutrix may be sufficient to identify the guilty party, if commission of the offense has first been established. *Noonan v. State*.... 520

Schools and School Districts.

1. A school district possesses only statutory powers and may contract only respecting objects, and to the extent, the law permits. *American Surety Co. v. School District*..... 6
2. In an action on a contract against a school district, the petition must affirmatively show that the contract is one which the district may make. *American Surety Co. v. School District* 6
3. Members of a school board, in exacting a bond for the benefit of laborers, mechanics, and materialmen, exercise statutory power for the beneficiaries to be protected thereby, and not for the school district. *American Surety Co. v. School District*..... 6
4. The statutory bond required of a contractor erecting a building for a school district protecting laborers and materialmen affords no basis for a cause of action against the school district in its corporate capacity. *American Surety Co. v. School District*..... 6
5. Covenants and conditions of a contractor's bond are not

to be read into or construed as part of, or to alter, his contract to erect a school building. *American Surety Co. v. School District* 6
6. The intent in enacting the rural high school act regulating the assessment and levy of taxes was to protect the taxpayer. *Howard v. Jensen* 102
7. In construing the rural high school act, the legislative intent and the object to be accomplished will be considered. *Howard v. Jensen* 102
8. The literal meaning of "shall" must be considered in determining the legislative intent of a statute regulating assessment and levy of rural high school tax. *Howard v. Jensen* 102

Specific Performance.

Evidence *held* to sustain decree denying specific performance of contract of adoption with right to inherit. *Johnson v. Kern* 537

States.

1. A resolution by one branch of the legislature authorizing an action against the state to recover damages caused by the negligence of a state employee does not render the state liable therefor. *Shear v. State* 865
2. Recovery against the state for damages caused by negligence of an officer, agent, or employee cannot be had in absence of express statute. *Shear v. State* 865

Statute of Frauds.

1. A written agreement to answer for the debt of another is void as to a person whose name is subscribed thereto by one not authorized by writing. *Massachusetts Bonding & Ins. Co. v. Nichols* 93
2. The statute of frauds cannot be evaded by mere changes in language nor by disguising transactions. *Massachusetts Bonding & Ins. Co. v. Nichols* 93

Statutes.

1. Generally, legislative acts will be held to operate prospectively unless a contrary intent is clearly disclosed. *State, ex rel. Spillman, v. Federated Merchants Mutual Ins. Co.* 98
2. The consequences resulting from construing a statute should be taken into consideration in determining legislative intent. *Howard v. Jensen* 102
3. Statutory provisions regulating assessment and levy of

taxes are mandatory when object is protection of taxpayer. *Howard v. Jensen* 102
4. Statutory provisions for the levy of a tax are imperative. *Howard v. Jensen* 102
5. A statute enacted after an alleged crime was committed, changing the time for appearance of defendant on appeal, relates to procedure, and governs the appeal. *Abbott v. State* 350
6. Law regulating public dances on Sunday and excepting cities of metropolitan class from its provisions *held* invalid as class legislation. *Galloway v. Wolfe* 824

Subrogation.

Subrogation is the substitution of another person to the rights of a creditor, but the person subrogated acquires no greater rights than the creditor had at the time of subrogation. *American Surety Co. v. School District* 6

Taxation. SEE BANKS AND BANKING, 5. LICENSES. STATUTES, 3, 4.
1. Trustees must present estimate for adoption to electors at annual meeting on first Monday of June to make levy of rural high school tax valid. *Howard v. Jensen* 102
2. A rural high school district annual tax levy, based on an estimate adopted by electors at a meeting on the second Monday instead of on the first Monday in June, *held* void. *Howard v. Jensen* 102
3. The lien of taxes regularly levied on realty is ordinarily perpetual, and can be divested only by payment or in some manner authorized by statute. *Flansburg v. Shumway* 125
4. Statute authorizing levy of taxes on stock of banks, loan and trust, and investment companies, in excess of five mills on the dollar valuation, *held* invalid. *State, ex rel. Spillman, v. Ord State Bank* 189
5. The discretion reposed in the board of equalization to determine value of property will not be disturbed unless clearly wrong. *Meridian Highway Bridge Co. v. Cedar County* 214
6. Statute providing rate for publishing notices governs rate for publishing delinquent tax lists, and not the statute providing the amount to be charged back by the county to the taxpayer. *Wisner v. Morrill County* 324
7. The legal rate for printing is only a maximum rate, and a county may show agreement for a lower rate for pub-

lication of delinquent tax notices. *Wisner v. Morrill County* 324
8. A newspaper must publish delinquent tax lists in the form submitted by the county treasurer. *Wisner v. Morrill County* 324
9. The remedy by appeal from the board of equalization is exclusive as to all questions properly before them; but, where land is not subject to taxation, the remedy by payment under protest and claim for refund is applicable. *Morrow v. Farmers Irrigation District* 424
10. Time for appeal by taxpayer from county board of equalization depends on whether appellant had a direct or indirect interest. *Sommerville v. Board of County Commissioners* 507
11. A court to which the law authorizes an appeal from a decision of a board of equalization must keep strictly within the statute defining its power. *Sommerville v. Board of County Commissioners* 507
12. A county treasurer selling real estate for delinquent taxes should include only delinquent taxes previously advertised. *McGerr v. Bradley* 841
13. Land may be sold at private sale for delinquent taxes levied and advertised for the previous year and not sold at public sale for want of bidders, though taxes for another year have become delinquent, but not advertised. *McGerr v. Bradley* 841
14. Private sale of land for taxes must be subject to taxes becoming delinquent after the advertisement for the previous year. *McGerr v. Bradley* 841
15. Cash value of land as of date of owner's death is proper basis for levying inheritance tax. *In re Estate of Fort* 854
16. Interest must be paid on inheritance taxes, unless paid within one year from accrual. *In re Estate of Fort* 854
17. Beneficiaries obtaining a substantial reduction in inheritance tax on appeal from county court are not liable for costs in the district court. *In re Estate of Fort* 854

Tenancy in Common.

1. A cotenant's possession of the property, to become adverse, requires notice that the entire estate is claimed in hostility to his cotenants. *Walter v. Walter* 671
2. Notice of a cotenant's hostile claim may be shown by hostile acts sufficient to put a man of ordinary prudence on guard; but acts reasonably consistent with title in his cotenants are not sufficient. *Walter v. Walter* 671

3. Acts of cotenant *held* not sufficient to give notice to cotenants of a hostile claim. *Walter v. Walter* 671
4. Acts constituting disseisin if done by a stranger may not have such effect against a cotenant when done by a tenant in common. *Walter v. Walter* 671
5. Cotenants are not chargeable with laches where they have no notice of a hostile claim by the tenant in possession. *Walter v. Walter* 671
6. A quitclaim deed of an "apparent interest" by heirs of a deceased cotenant to two coheirs *held* insufficient notice of a hostile claim against cotenants of their deceased ancestor. *Walter v. Walter* 671
7. A "family arrangement" between heirs of a deceased cotenant in possession is not binding on cotenants of deceased taking no part therein. *Walter v. Walter* 671

Trade-Marks and Trade-Names.

1. Mere laches is no defense to a suit to enjoin continuing wrongful and fraudulent use of a trade-name. *Northwest Ready Roofing Co. v. Antes* 121
2. Defendant enjoined from use of trade-name. *Northwest Ready Roofing Co., v. Antes* 121

Treaties.

1. Ordinarily, provisions of a treaty should be given a liberal construction. *Goos v. Brocks* 750
2. A state of war between parties to a treaty abrogates only provisions thereof incompatible with a state of war. *Goos v. Brocks* 750

Trial. SEE APPEAL AND ERROR. CRIMINAL LAW.

1. Where there is evidence which would support a verdict, if uncontradicted, the court should submit the case to the jury; it not being the function of the court to weigh the evidence. *Stohlman v. Davis* 178
2. Where a conspiracy to defraud was the only issue tendered by the pleadings, *held* error to submit the case on the theory of liability under a partnership relation. *Reid v. Brechet* 411
3. In an action for conspiracy to defraud, refusal to direct a verdict for defendants for lack of evidence *held* error. *Reid v. Brechet* 411
4. Special findings to sustain a judgment against a general verdict must establish all the ultimate facts. *In re Estate of Kerr* 630

5. The court may determine the order of proof where judgment would go against each of several parties if no evidence were introduced. *In re Estate of O'Connor* 636
6. The court in contingencies where no rule has been prescribed must adopt a rule. *In re Estate of O'Connor* 636
7. Where the evidence would sustain a verdict for either party, a motion for a directed verdict *held* properly overruled. *McCann v. Omaha & C. B. Street R. Co* 786
8. Plaintiff in a personal injury action may inquire of defendant on cross-examination as to whether he carries liability insurance *Sloan v. Harrington* 809
9. The purpose of inquiries as to whether defendant carries liability insurance is to ascertain the status and interest of parties, and the court on request should, by instruction, limit the jury's consideration of the testimony to such purpose. *Sloan v. Harrington* 809
10. The trial judge without request must instruct on the law applicable to the issues, if supported by evidence. *Hall v. Rice* 813

Trusts.

Where a trust fund consisted of money, failure to find money in the assets of an insolvent trustee is *prima facie* proof that the trust fund had been dissipated, and unless the *cestui que trust* can trace the fund into some particular existing asset, or mass of assets, particular or general, the trust fails for want of a subject. *State, ex rel. Spillman, v. Citizens State Bank* 358

Vendor and Purchaser. SEE MORTGAGES, 5-11.

Joint occupancy of premises as a family home *held* not to impart notice of wife's claim of any interest other than homestead right. *Storz v. Clarke* 488

Waters.

1. Irrigation districts are quasi-public corporations, with power to assess property to raise revenue for irrigation. *Flansburg v. Shumway* 125
2. Irrigation district assessments are taxes within the statute making general taxes a first lien on land, and take priority over an existing mortgage lien. *Flansburg v. Shumway* 125
3. Where a county treasurer executed in favor of an irrigation district a tax sale certificate and receipts for subsequent taxes, but did not deliver them, and no actual payment was made, the tax liens were not destroyed by

expiration of the statutory period for enforcing them, but were entitled to priority over an earlier mortgage lien. *Flansburg v. Shumway* 125
4. An irrigation company incurs no liability by improving an existing drainage course without negligence. *Wiles v. Farmers Irrigation District* 288
5. An irrigation district is only liable for negligent construction or operation of its seep ditches after it obtains right of way. *Wiles v. Farmers Irrigation District* 288
6. "Subirrigation", as used in the law authorizing refund of taxes on lands not benefited by irrigation, embraces all lands that cannot be benefited by irrigation. *Morrow v. Farmers Irrigation District* 424
7. Subirrigated lands in an irrigation district are not taxable for operating expenses. *Morrow v. Farmers Irrigation District* 424
8. Sec. 2878, Comp. St. 1922, providing for refund of irrigation taxes paid under protest, *held* to create a cumulative remedy. *Morrow v. Farmers Irrigation District* 424

Wills.

1. Will *held* to have lapsed on death of sole legatee without issue, and not entitled to probate. *In re Estate of Strelow* 168
2. A legatee seeking probate of a will must allege and prove the testator's capacity, that the instrument is in legal form, and that he is entitled to the legacy. *In re Estate of Strelow* 168
3. "Issue" in the statute substituting issue of legatee or devisee dying before testator, *held* to mean offspring and lineal descendants; and *held* that they take as substituted legatees or devisees, and not as heirs. *In re Estate of Strelow* 168
4. In a will contest, permitting the jury to consider an earlier lapsed will with a later will *held* error. *In re Estate of Strelow* 168
5. A remark by the court that he thought a physician being examined as to testator's competency was telling the truth *held* prejudicial error. *In re Estate of Strelow* 168
6. The intention of the testator must be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will; no particular words or conventional forms of expression are necessary in a will. *In re Estate of Combs* 257
7. In construing a will, the court will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it. *In re Estate of Combs* 257

8. Will construed, and *held*, by implication, to exclude the widow as devisee of the remainder, and to designate heirs of the blood as devisees. *In re Estate of Combs* 257
9. A defeated litigant in a will contest is not entitled to a trial *de novo* on appeal. *In re Estate of Kerr* 630
10. On appeal from a judgment in a will contest, issues of fact are determined by sufficiency of evidence to sustain the verdict or findings. *In re Estate of Kerr* 630
11. Issue of fact as to mental capacity to make a will is for the jury. *In re Estate of Kerr* 630
12. Evidence of insane delusions with respect to ignored kindred *held* admissible as to mental or testamentary capacity. *In re Estate of Kerr* 630
13. The question in case of insane delusions is whether such delusions controlled the testator's actions. *In re Estate of Kerr* 630
14. An instruction referring to kindred who would inherit in absence of a will *held* not prejudicially erroneous. *In re Estate of Kerr* 630
15. The jury must consider unnatural and unreasonable provisions of a will in connection with evidence of testator's mental incompetency. *In re Estate of Kerr* 630
16. In construing a will, intent of testator governs. *In re Estate of Smith* 776
17. A codicil to a will that no devisee addicted to excessive use of liquor or drugs should be a beneficiary is a valid condition subsequent. *In re Estate of Smith* 776
18. Possession and income from a devise on condition withheld until condition performed. *In re Estate of Smith* 776
19. The latter of two irreconcilable provisions of a will will prevail over the earlier, unless a contrary intention is evinced. *In re Estate of Smith* 776

Witnesses.

1. One entitled to present claim for compensation for death under the workmen's compensation act is the representative of a deceased person within the statute relating to competency of witnesses. *Priest v. Business Men's Protective Ass'n* 198
2. In a proceeding by an employee for compensation for death under the workmen's compensation act, the officers and directors of a mutual assessment association *held* incompetent to testify to transactions or conversations between them and the deceased against his legal representative. *Priest v. Business Men's Protective Ass'n* 198
3. Transactions in which a deceased participated are not

incompetent, and evidence thereof may be given by persons not disqualified. *Priest v. Business Men's Protective Ass'n* 198

4. A letter proved by competent evidence to have been written by deceased is competent, though the adverse party is representative of deceased. *Priest v. Business Men's Protective Ass'n* 198

5. Grantee of deceased is legal representative as against an attacking creditor. *Colfax County Bank v. Konvalin*..... 276